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Negotiating the contours of unlawful hate speech: regulation under provincial Human Rights Laws in Canada

Luke McNamara

University of Wollongong, lukem@uow.edu.au

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Abstract

This article has examined more than half a century of operation of provincial and territorial hate speech laws in Canada. This examination has confirmed that free speech sensitivity has long been an integral and enduring feature of the administration and interpretation of legislative regimes for the regulation of hate speech—a finding that should come as a shock to no-one. What is surprising is the way in which free speech sensitivity has impacted on the operation of hate speech laws, and the effects of that influence on the quality of the protection provided to victims by existing provincial and territorial laws.... One of the chief objectives of hate speech prohibitions in provincial and territorial human rights statutes is to draw a line between free speech which must be protected (or at least tolerated), and hate speech which must be outlawed and sanctioned because of its harmful effects. Such line-drawing exercises are never simple and almost always controversial. However, the extent of the uncertainty and controversy has been exacerbated in Canada by the multi-layered influences of free speech sensitivity described above, as well as ongoing differences amongst decisionmakers regarding the legitimate scope of hate speech prohibitions. The net result is that the contours of unlawful hate speech in Canada are anything but sharp. On the contrary, the boundary between free speech and hate speech remains contested and fluid.

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NEGOTIATING THE CONTOURS OF UNLAWFUL HATE SPEECH: REGULATION UNDER PROVINCIAL HUMAN RIGHTS LAWS IN CANADA

NEGOTIATING THE CONTOURS OF UNLAWFUL HATE SPEECH: REGULATION UNDER PROVINCIAL HUMAN RIGHTS LAWS IN CANADA*

Luke McNamara**

1. INTRODUCTION

Academic writing and media commentary on Canadian hate speech laws has focused heavily on the offences created by the *Criminal Code*[1]and the restrictions in the *Canadian Human Rights Act* on telephonic communication of hate messages.[2] In both cases, this intensity of interest has been prompted by a range of factors including the national operation of these laws, their mobilization against well-known and attention seeking racist organisations and individuals, and the fact that the Supreme Court of Canada has been called upon to rule on the constitutional validity and interpretation of both federal statutes. Consequently, there is a substantial body of academic writing on

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**BA, LLB (UNSW), LLM (Manitoba), PhD (Wollongong). Associate Professor, Faculty of Law, University of Wollongong, Australia. Email: lukem@uow.edu.au.

1 Canadian *Criminal Code*, R.S.C. 1985, c. C-46, s.318-319. See e.g. StefanBraun *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (Toronto: University of Toronto Press, 2004); Sanjeev Anand, "Expressions of Racial Hatred and Criminal Law: Proposals for Reform" (1997) 40 Criminal Law Quarterly 215; and Senaka K. Suriya, *Combatting Hate?: A Socio-Legal Discussion on the Criminalization of Hate in Canada* (Ottawa: Department of Law, Carleton University, 1998).

2 *Canadian Human Rights Act* R.S.C. 1977, s.13. See, for example, Chris Gosnell. "Hate Speech on the Internet: A Question of Context" (1998) 23 Queen's L.J. 369; Eddie Taylor, "Hanging up on Hate: Contempt of Court as a Tool to Shut Down Hatelines" (1995) 5 National Journal of Constitutional Law 163; and John L. Finlay & Brian Smith, "The Canadian Liberty Net Litigation: A Prototype for the Regulation of Hate Speech on the Internet" (Paper presented to the Hatred in Canada: Perspectives, Action, and Prevention Conference, University of Victoria, 18-18 September 1998) [unpublished on file with author].

the decisions of the Supreme Court of Canada in *R v. Keegstra*[3] and *Taylor v. Canadian Human Rights Commission*,[4] focusing on the Court's resolution of the tension between the protection afforded to freedom of expression under the *Canadian Charter of Rights and Freedoms*[5] and the criminalization of hate speech under the *Criminal Code*.[6]

Comparatively little attention has been devoted to the operation of restrictions on various forms of hate speech contained in the human rights statutes of almost all Canadian provinces and territories. And yet, provincial hate speech laws have a long history in Canada and have been invoked on a number of occasions in efforts to restrict and/or sanction conduct by individuals or groups that promotes ill-feeling and discrimination towards particular minorities, including Jews, Aboriginal people, people of colour, and gays and lesbians.

The first judicial decision under a provincial hate speech law was handed down in Manitoba in 1934,[7] and in recent years, a series of hate speech cases have been decided by tribunals and courts in British Columbia, Alberta and Saskatchewan.[8] There is now a small but significant body of commission, tribunal and court decisions on the scope of provincial hate speech laws which represent an important component

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[3] In *R. v. Keegstra,* [1990] 3 S.C.R. 697; [1991] 2 W.W.R. 1, the Court upheld the constitutional validity of s.319 of the *Criminal Code* [*Keegstra*].

[4] In *Taylor v. Canadian Human Rights Commission,* [1990] 3 S.C.R. 892; (1990), 75 D.L.R. (4th) 577, the Court upheld the constitutional validity of s.13 of the *Canadian Human Rights Act* [*Taylor*].

[5] Section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].

[6] See e.g. Alan Borovoy, "How Not to Fight Racial Hatred" in David Schneiderman, ed., *Freedom of Expression and the Charter* (Calgary: Thomson Professional Publishing Company, 1991) 243; Irwin Cotler, "Principles and Perspectives on Hate Speech, Freedom of Expression and Non-Discrimination: The Canadian Experience as a Case-Study in Striking a Balance" in Sandra Coliver, ed., *Striking A Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London and Colchester: Article 19, International Centre Against Censorship and Human Rights Centre, University of Essex, 1992) 123; Bruce P. Elman, "Combatting Racist Speech: The Canadian Experience" (1994) 32 Alta. L. Rev. 623; Terry Heinrichs, "Censorship as Free Speech! Free Expression, Values and the Logic of Silencing in *R v. Keegstra* (1998) 36(4) Alta. L. Rev. 835; Richard Moon, "Drawing Lines in a Cultural of Prejudice: *R v. Keegstra* and the Restriction of Hate Propaganda" (1992) 26(1) U.B.C. L. Rev.; Derek Raymaker & David Kilgour, "The Freedom to Promote Hate: What We Learned from Jim Keegstra and Malcolm Ross" (1992) U.N.B.L.J. 327; Tasmin Solomon, "Antisemitism as Free Speech: Judicial Responses to Hate Propaganda in *Zundel* and *Keegstra*" (1995) 13(1) Australian-Canadian Studies 1; Lorraine E. Weinrib, "Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*" (1991) 36 McGill L.J. 1416; Jeffrey I. Ross, "Hate Crime in Canada: Growing Pains in New Legislation" in Mark S. Hamm ed., *Hate Crime: International Perspectives on Causes and Control* (Cincinnati: ACJS/Anderson, 1994) 159; Ian McKenna, "Canada's Hate Propaganda Laws—A Critique" (1994) 9 British Journal of Canadian Studies 15.

[7] *Tobias v. Whittaker* (13 February 1935), (Manitoba Court of King's Bench) [*Tobias*].

[8] See *infra* notes 344, 120, 334, 292, 278, 250 respectively.

of the Canadian legal system's attempts to delineate the boundary between unlawful hate speech and lawful communication and expression.[9]

The dominant theme in political debates, academic scholarship and appellate court litigation on federal hate speech laws has been whether the legal regulation of hate speech can be reconciled with the valued liberal democratic principle that all citizens are entitled to exercise 'free speech' or 'free expression'. In legal terms, these debates have often been assumed to focus on the question of the *validity* of legislative restrictions on hate speech in light of the *Charter*. And yet, a challenge to the validity of legislation is only the most extreme manifestation of the impact of free speech arguments on the interpretation and application of legal restrictions on hate speech.

In recent research on racist hate speech laws in Australia[10] I have adopted the concept of 'free speech sensitivity'[11] to capture the full extent of the influence of free speech rights and principles on the legal regulation of hate speech. That is, not only expressly defined and protected legal and constitutional rights and associated inquiries as to legislative validity, but also free speech political values, principles, rhetoric, consciousness and preferences as to the relative breadth of valid legislative restrictions. The phrase 'free speech sensitivity' is particularly appropriate in the Australian legal and political context, where the 'right' of free speech does not have a legislative or explicit constitutional source, but is primarily derived from and protected by the common law.[12] As a result there is considerable uncertainty about its precise dimensions and attributes, as well as its implications for attempts to regulate communicative behaviour. However, the concept of free speech sensitivity is also valuable with reference to Canada, because as Richard Moon has observed, the

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[9] It is important to recognise that the board of inquiry/panel/tribunal/court decisions examined in this article do not represent all matters in which complaints have been lodged alleging violation of provincial/territorial restrictions on hate speech, but only those which were resolved by formal adjudication, conciliation having been unsuccessful or deemed inappropriate by one or both of the parties. By virtue of their public status, these decisions play a much more significant role in shaping the contours of the free speech/hate speech boundary than the outcomes of conciliated complaints, which are usually private and confidential, therefore making very little contribution to broader debates as to where the line should be drawn. On the role of mediation in the human rights complaint context, see generally, William Black & Philip Bryden "Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the BC Human Rights Commission's Early Mediation Project" (2004) 37(1) U.B.C. L.Rev. 73.

[10] Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney: Institute of Criminology, University of Sydney, 2002) [McNamara].

[11] After Laurence Tribe, *American Constitutional Law,* 2nd ed. (Minneola, NY: The Foundation Press, 1988) at 856. See McNamara, *supra* note 10 at 4-5.

[12] See *Lange v. ABC* (1997) 189 C.L.R. 520 (High Court of Australia); and Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot: Ashgate, 2000).

expressly defined constitutional *right* to free speech is not synonymous with "freedom of expression as a moral and political ideal".[13] The latter is a subset of the former, and so the legally defined 'right' does not exhaust the political claim to uninhibited communication that is advanced in a range of contexts.

In the Canadian legal system, one of the important sites for free speech scrutiny of hate speech laws, both in terms of the validity of the legislation and the breadth of the restriction imposed by the legislation, is the quasi-judicial and judicial adjudication of complaints that provincial human rights laws dealing with hate speech have been violated.

This article reports on a comprehensive examination of cases in which tribunals, boards of inquiry and the courts have been called upon to adjudicate on complaints of unlawful hate speech under provincial human rights statutes.[14] The primary objectives of this examination are to evaluate the contribution which provincial tribunals, boards and courts have made to illuminating the boundary between protected free speech and restricted hate speech in Canadian public discourse, and to identify the impact that divergent and sometimes competing conceptions of 'free speech sensitivity' have had on the construction and positioning of the free speech/hate speech boundary.

Part 2 of this article will provide a brief overview of existing provincial and territorial human rights laws dealing with hate speech. In part 3, I will examine the operation of the first and most common type of provincial/territorial legislation: a narrow restriction on the public display of discriminatory signs and symbols. In part 4, I will review the operation of the more controversial second type of legislation that has been enacted in a number of jurisdictions: a broader restriction on public communication which promotes hatred or other forms of ill-feeling towards a particular group. Part 5 will draw together the main findings of my examination of over 20 hate speech decisions, and summarise my conclusions on the way in which provincial adjudicators have negotiated the contours of unlawful hate speech.

2. OVERVIEW OF PROVINCIAL AND TERRITORIAL LAWS

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[13] Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 3.

[14] The review covers the period up to 31 March 2004.

There are three main points of distinction between the different legislative formulations that currently operate in Canadian provinces and territories:

> i) Whether the legislation covers a broad range of methods of communication or whether it is limited to the display of "signs and symbols";
>
> ii) Whether the legislation defines the unlawful consequence in terms of exposure to hatred/contempt or discrimination/intention to discriminate (or both);
>
> iii) The range of identified groups covered by the legislation.[15]

The primary focus of this article is on provincial legislative provisions that render unlawful the promotion of hatred or contempt towards one or more identified groups (or members of a group) by any one of a wide range of methods of communication. Such hate speech laws currently operate in:

> i) Saskatchewan under s.14 of the Saskatchewan *Human Rights Code,* R.S.S. 1979, c. S-24.1 (since 1979, as amended in 1989);
>
> ii) Alberta under s.2 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (since 1996);
>
> iii) British Columbia under s.7 of the of the *Human Rights Code,* R.S.B.C. 1996, c. 210 (since 1993);[16]
>
> iv) Northwest Territories under s.13 of the *Consolidation Of Human Rights Act*. R.S.N.W.T. 2002, c. 18 (since 2004).[17]

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[15] While the initial focus of early provincial human rights statutes was on racial or ethnic minorities, in all jurisdictions the list of identified groups expanded incrementally in the latter decades of the 20th century to include a range of groups who suffer discrimination.

[16] See also the statutory tort created by the British Columbia *Civil Rights Protection Act,* R.S.B.C. 1996, c. 49 (discussed below).

[17] This Act came into force July 1st, 2004. Section 13 of the *Act* provides:

> (1) No person shall, on the basis of a prohibited ground of discrimination, publish or display or cause or permit to be published or displayed any statement, notice, sign, symbol, emblem or other representation that
>
> (a) expresses or implies discrimination or any intention to discriminate against any individual or class of individuals;
>
> (b) incites or is calculated to incite others to discriminate against any individual or class of individuals; or
>
> (c) is likely to expose any individual or class of individuals to hatred or contempt.
>
> (2) Nothing in sub-section (1) shall be construed so as to interfere with the free expression of opinion on any subject.

A similar law also operated in Manitoba between 1976 and 1987.[18]

Human rights legislation in all other provincial or territorial jurisdictions (except the Yukon Territory[19]) makes it unlawful to display any "notice, sign, symbol, emblem, or other representation" which "indicates discrimination or an intention to discriminate" against identified groups.[20] The relevant laws are:

> i) Manitoba: s.18 of the *Human Rights Code* R.S.M. 1987, c. H-175;
>
> ii) New Brunswick: s.6 of the *Human Rights Act* R.S.N.B. 1985, c. 30;
>
> iii) Newfoundland: s.14 of the *Human Rights Code* R.S.N.L. 1990, c. H-14 ;
>
> iv) Nova Scotia: s.7 of the *Human Rights Act* R.S.N.S. 1989, c. 214;
>
> v) Nunavut: s.5 of the *Fair Practices Act* R.S.N.W.T. 1988, c. F-2, as enacted for Nunavut pursuant to the *Nunavut Act*, R.S.C. 1993, c. 28;[21]
>
> vi) Ontario: s.13 of the *Human Rights Code* R.S.O. 1990, c. H-19;
>
> vii) Prince Edward Island: s.12 of the *Human Rights Act* R.S.P.E.I. 1988, c. H-12;
>
> viii) Quebec: s.11 of the *Quebec Charter of Human Rights and Freedoms* R.S.Q. 1975, c. C-12.

It may be questioned whether these laws should technically be categorised as hate speech laws at all, given that they do not render unlawful the promotion of, or exposure to, hatred or contempt as such. However, they have been included as part of the 'set' of board/tribunal/court decisions examined for the purpose of this article for

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[18] Manitoba *Human Rights Act*, R.S.M. 1970, c. 104, s.2 (discussed below). See also the statutory tort originally added to the Manitoba *Libel Act,* R.S.M. 1913, c. 143 in 1934, but now found in s.19 of the Manitoba *Defamation Act,* R.S.M. 1987, c. D20 (discussed below).

[19] A discriminatory signs and symbols prohibition was contained in s.5 of the *Fair Practices Ordinance,* R.O.Y.T. 1971, c. F2, but was omitted from the Yukon's *Human Rights Act,* R.S.Y. 1987, c. 3, which superseded the *Ordinance*. At this time it was decided that it was not necessary to include the conventional discriminatory signs and symbols prohibition or any form of restriction on hate speech in the territorial human rights legislation, on the basis that hate speech and hate literature were already regulated by the hate propaganda provisions of the Canadian *Criminal Code* (*supra* note 1) at s. 318-319 (Letter from Pamela Muir, Department of Justice, Yukon Territorial Government (9 September 1999) personal communication). In 1998 the Yukon Human Rights Commission recommended that a hate speech provision be added to the *Human Rights Act* 1987, but the government has not acted on this recommendation (Letter from Heather MacFadgen, Director, Yukon Human Rights Commission (21 January 2004) personal communication).

[20] An equivalent provision is also found in s.12 of the *Canadian Human Rights Act* R.S.C. 1977, c. 33.

[21] A NWT statute that was duplicated for Nunavut on April 1, 1999 according to s. 29 of the *Nunavut Act*, R.S.C. 1993, c. 28. In November 2004 the *Fair Practices Act* 1988 will be replaced by the *Human Rights Act* 2003, which includes a 'standard' prohibition on discriminatory signs and symbols.

the following reasons: First, the discriminatory signs and symbols model of legislation was the forerunner of the broader provincial hate speech laws that currently operate in the provinces of western Canada. Second, at least in some cases, these provisions have been defined broadly to deal with conduct similar in nature to that at which the broader hate speech laws are directed. Third, the small number of cases in which these laws have been subject to judicial or quasi-judicial interpretation shed further light on one of the main concerns of this article—the practical relationship between the right to free speech and legislative attempts to protect minorities from harmful expression or communication.

3. PROVINCIAL LAWS DEALING WITH SIGNS AND SYMBOLS INDICATING DISCRIMINATION

3.1 The Prototype: Ontario's *Racial Discrimination Act* 1944[22]

The first Canadian statute to restrict racist expression was the *Racial Discrimination Act*, passed by the Ontario provincial legislature in 1944. The legislation did not prohibit discrimination as such. Rather, its specific and sole effect was to prohibit racially discriminatory publications. Section 1 of the *Act* stated that:

> No person shall,—
>
> (a) publish or display or cause to be published or displayed; or
>
> (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls,
>
> any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

The model of regulation adopted in the Ontario *Racial Discrimination Act* has been described by Tarnopolsky as "quasi-criminal[ization]".[23] Section 3 provided for a

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[22] R.S.O. 1944, c. 51.

[23] See Walter Surma Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo Limited, 1982) at 27 [Tarnopolsky].

penalty of one hundred dollars for first offences and two hundred dollars for second or subsequent offences. In addition s.4(2) provided for injunctive relief. The procedure for enforcement under the *Act* was a blend of civil and criminal procedures. "Any person" could commence proceedings in the Supreme Court of Ontario to enforce the prohibition on discriminatory publication, but the Attorney General's consent was required under s.4(1). The 1944 *Act* was "designed to combat the once prevalent 'whites only' signs that were prominently displayed in shop windows, on beaches and in other places of public resort."[24] This historical context helps to explain what appears as a rather curious confinement to particular methods of communication, but it is also important to appreciate that the legislation's narrow scope is partly explained by concerns about the encroachment of anti-discrimination legislation on free speech. Section 2 stated that "[t]his Act shall not be deemed to interfere with the free expression of opinions upon any subject by speech or in writing …." [25]

The Ontario *Racial Discrimination Act* became the 'prototype' for provincial legislation across the country.[26] A discriminatory signs and symbols provision based on s.1 of the *Act* became a standard inclusion in the human rights statutes that were incrementally adopted by Canadian provinces and territories from the 1940s to the 1970s:

> i) Saskatchewan: *The Saskatchewan Bill of Rights,* R.S.S. 1947, c. 35 s.14[27];
>
> ii) New Brunswick: *Fair Accommodation Practices Act,* R.S.N.B. 1959, c. 6, s.3;[28]
>
> iii) Nova Scotia: *Fair Accommodation Practices Act,* S.N.S. 1959, c. 5, s.5

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[24] See John D. McAlpine, *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia*, presented to the Honourable J. H. Heinrich, Minister of Labour for the Province of British Columbia (Vancouver: 1981), at 58 [McAlpine].

[25] However, it is equally clear that, during a time of war (i.e. World War II) free speech protections were not universally applicable: s.2 also stated that "This Act...shall not confer any protection to or benefit upon enemy aliens." See Tarnopolsky, *supra* note 23 at 331.

[26] *Ibid.*

[27] In 1956 a similar provision was included in s.4 of the Saskatchewan *Fair Accommodation Practices Act*, R.S.S. 1956, c. 68.

[28] Evidence that some provinces adopted an 'off the shelf' approach to human rights law reform, based on the Ontario *Racial Discrimination Act* 1944 (*supra* note 22) may be found in the wording of s.3(2) of the New Brunswick *Fair Accommodation Practices* Act 1959, which was enacted more than two decades after the end of Word War II: "Nothing in this section shall be deemed to interfere with the free expression of opinions upon any subject by speech or in writing and *shall not confer any protection to or benefit upon enemy aliens*" [Emphasis added].

iv)British Columbia: *Fair Accommodation Practices Act,* 1961, R.S.B.C., c. 50, s.4;

v) Yukon Territory: *Fair Practices Ordinance,* R.O.Y.T. 1971, c..

F2, s.5;

vi) Quebec: *Employment Discrimination Act,* R.S.Q. 1964, c. 46, s.4;

vii) NWT: *Fair Practices Ordinance,* R.O.N.W.T 1966, c. 5, s.5;

viii) Prince Edward Island: *Human Rights Code,* R.S.P.E.I. 1968, c.24, s.8;

ix) Manitoba: *Human Rights Act,* R.S.M.1970, c. 104, s.2;

x) Newfoundland: *Human Rights Code,* R.S.N.L. 1970, c. 262, s.11;

xi) Alberta: *Individual's Rights Protection Act,* R.S.A. 1972, c.2, s.2.[29]

Significantly, the ambiguous free speech qualification contained in the Ontario model (ss.2) was also widely adopted, and, as will be discussed below, has subsequently caused considerable consternation with respect to the interpretation and application of the legislative restrictions on discriminatory signs and symbols as well as other forms of hate speech.[30]

As Ontario human rights laws developed and expanded in the 1950s and 1960s, a provision based on s.1 of the *Racial Discrimination Act* 1944[31] was included in the successor statutes, including the *Fair Accommodation Practices Act,* R.S.O. 1954, c. 28[32] and the Ontario *Human Rights Code*, R.S.O. 1961-62, c. 93.

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[29] In the second reading speech on the Individual's Rights Protection Bill (Alberta, Legislative Assembly, *Hansard*, (17 May 1972) at 52-37), Progressive-Conservative MLA, Ronald Ghitter, explained the need for the new prohibition on discriminatory signs and symbols by producing examples of offending signs:

> ...[L]et me show you the types of signs that we have, right today, in the Province of Alberta. Here is a sign that is situated on a building in downtown Edmonton. It's an old sign, but it's still there, and on it it says, 'White Help Only' Here is another sign that was on a farmer's yard along Highway 21 in this province, where the sign states, 'Indians Stay Out'; here is another sign which is found in Bowness Park in Calgary, Alberta, and it is a picture of an Indian with a big mouth, and the sign beside him says, 'I gettum fat on garbage.' It is signs like this, Mr. Speaker, that must be done away with and that is why the importance of the section relating to the display of emblems and signs which discriminate against a class [sic]. Signs of this nature are signs we can well do without in the Province of Alberta.

[30] See Tarnopolsky, *supra* note 23 at 331.

[31] *Supra* note 22.

[32] The Ontario *Fair Accommodation Practices Act* R.S.O. 1954, c. 28 also signalled a shift towards enforcement of legislative prohibitions on race discrimination via complaint to an administrative officer and, where necessary, adjudication by a quasi-judicial commission or tribunal.

Today, s.13 of the Ontario *Human Rights Code,* R.S.O. 1990, c. H-19 provides that:

> 13. (1) A right under Part I [of the *Code*] is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.
>
> (2) Subsection (1) shall not interfere with freedom of expression of opinion.

The main difference between this provision and the 1944 *Act* is that in its current form the prohibition applies not only to discrimination on the basis of "race or creed" but to all categories of unlawful discrimination under Part I of the *Code*: "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability". However, the emphases on discrimination as the consequence which renders the conduct unlawful, and on "signs and symbols" as the prohibited mode of communication, remain. In one important respect the current formulation of the discriminatory signs and symbols prohibition in the Ontario *Human Rights Code* 1990 is even narrower than the original. The display of a sign or symbol will only be unlawful under s.13 if the person responsible *intends* to unlawfully discriminate or *intends* to incite others to discriminate. It is no longer sufficient in Ontario that the sign or symbol *indicates* discrimination—a formulation of the relationship between conduct and consequence which, although ambiguous, can be interpreted to support a focus on the *effect* of the display of the sign, irrespective of the intention of the person responsible for the display. Consequently, the current legislation in those provincial and territorial jurisdictions that have adopted and maintained the original 'Ontario model' now casts a slightly broader net with respect to the regulation of discriminatory signs and symbols than the legislation currently in force in Ontario.

Notwithstanding its pioneering origins and symbolic significance, it is not surprising, given the maintenance of these restrictive features, that there have been no board of inquiry, tribunal or court decisions in Ontario involving an allegation of a

violation of the prohibition on discriminatory signs and symbols in s.13 of the *Code*.[33] Section 13 has been described as "only useful in addressing a narrow range of circumstances that might fall within the general category of hate motivated activities" with the result that the Ontario *Human Rights Code* "...has a very limited capacity for dealing with hate propaganda."[34]

The same may be said of the provisions found in the legislation of those provincial and territorial jurisdictions that have followed the original Ontario model, even though they are now somewhat broader in terms than current Ontario legislation. However, in a small number of cases the discriminatory signs and symbols prohibition has been invoked and subjected to adjudication.

3.2 Applying the Discriminatory Signs and Symbols Model

In the three decades or so during which legislative prohibitions on discriminatory signs and symbols have been in operation in the majority of Canadian provinces and territories, there have been only seven public adjudications—that is, decisions handed down by a board of inquiry, tribunal or court in response to a complaint that the legislation had been violated. In five of these cases, the complaint was upheld, suggesting that the definition of unlawful conduct under the Ontario model is not so

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[33] Section 13 of the Ontario *Human Rights Code* 1990 has been addressed in one Board of Inquiry decision, but it was not a hate speech complaint. In *Entrop v. Imperial Oil Ltd (No 8)* (1996), 27 C.H.R.R. D/210, an Ontario Board of Inquiry held that print/video communications of a discriminatory workplace drug testing policy were breaches of s.13: Email from Brian Eyolfson, Counsel, Ontario Human Rights Commission (2 September 1999). See also *Entrop v. Imperial Oil Ltd*. (2000), 50 O.R. (3d) 18, 189 D.L.R. (4th) 14 (Ontario C.A.).
In *Lam v. McCaw* (1977), Ontario (Ontario Bd. Inq.), the complaint involved precisely the sort of conduct at which the discriminatory signs and symbols prohibition was directed: the display by a landlord of a sign on rental premises in Kingston, Ontario, that said "Aryan Caucasian Adults Only". Ironically, however, the Board of Inquiry did not consider whether there had been a breach of the prohibition on discriminatory signs and symbols in s.1 of the Ontario *Human Rights Code*, R.S.O. 1970, c. 318. At the request of the complainants and the Ontario Human Rights Commission, the Board focused instead on whether there had been accommodation discrimination contrary to s.3 of the *Code* (The Board ruled that there had, and ordered the respondent to pay the complainants $500 damages.). According to the Board, the "reasons for avoiding" the discriminatory signs and symbols prohibition, cited by counsel for the complainants and the Commission, "were that questions of its constitutional validity might come up, in relation to rights of freedom of expression (at 5). As will be revealed throughout this article, variations of this theme have been a recurring feature of the operation of provincial hate speech laws from the 1970s to the present day.

[34] Letter from Calvin Bernard, Acting Director, Ontario Human Rights Commission to author (18 February 1994). An important practical consequence of the *Code's* limited anti-hate laws is that complaints concerning hate propaganda are "typically referred by [Ontario Human Rights Commission] staff to the Ministry of Attorney General" for handling under the Canadian *Criminal Code*'s hate speech provisions (*ibid.*).

narrow as to be completely without effect. However, an examination of the decided cases—including the nature of the conduct which gave rise to the initiation of a complaint, and the analysis and reasoning employed during the course of adjudication —does confirm that legislation prohibiting discriminatory signs and symbols has played only a very minor role in the regulation of conduct which generates ill-feeling towards identifiable groups. The main reason for this has been that this approach only regulates a very small sub-set of the modes of communication which can be employed to generate ill-feeling or promote discrimination, but some uncertainty regarding the meaning of the phrase "indicates discrimination" has also been a factor.

Nonetheless, an examination of these decisions introduces and illustrates some important themes in the history of the construction of the hate speech/free speech boundary under Canadian provincial laws. In addition, it provides an important background and context for the operation and interpretation of the broader provincial hate speech laws which currently operate in the western Canadian provinces, and which will be considered in Part 4 of the article.

Levesque and Tardif v. The Daily Gleaner and Smith[35]

The first formal adjudication in relation to a complaint of unlawful display of a discriminatory sign or symbol in Canada arose under s.6 of New Brunswick *Human Rights Act*[36] in 1974. It was a rather inauspicious debut for public pronouncements on the legal regulation of racist hate speech in Canada: Ferdinand Levesque and Patrick Tardif complained that two letters to the editor that appeared in a Fredericton newspaper, *The Daily Gleaner*, and which were written by Donald Smith, violated s.6 in that their contents promoted hatred and racism against the Francophone community.[37]

The Board of Inquiry ruled that the conduct complained of did not fall within the scope of the *Act*. Based on an idiosyncratic interpretation of the words "person or class of persons" in s.6, the Board concluded that the *Act* "does not provide the

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[35] (10 September 1974) New Brunswick (N.B. Bd. Inq.) [*The Daily Gleaner*].

[36] R.S.N.B. 1985, c. 30.

[37] The content and tone of the letters is illustrated by the opening of the 12 February 1974 letter: "Sir: As we all know to our sorrow, the Liberal "Equal Opportunity" caper was nothing but a thinly

machinery to deal with a complaint by one or two people on behalf of a large group of people with the same ethnic background."[38] The Board interpreted the legislation as requiring the complainants to establish that they had been personally discriminated against by the respondents, even though this requirement seems to have no foundation in the words of s.6 and is at odds with what was widely regarded as the objective of legislative restrictions on the public display of discriminatory signs and symbols. In any event, the written decision makes it clear that the Board of Inquiry was not sympathetic to the imposition of legal restrictions on public communication, particularly by a human rights commission.

Thirty years on, the decision in *The Daily Gleaner* is unsatisfactory—particularly because it failed to consider the complaint on its merits,[39] and instead dismissed the complaint on dubious jurisdictional grounds. However, the decision remains a significant part of the history of provincial hate speech laws in Canada, not simply because it was the first discriminatory signs and symbols case to be adjudicated, but because it contains a number of linked features which have become recurring themes in subsequently decided cases in other jurisdictions. Specifically, the Board of Inquiry's approach was underpinned by an understanding of free speech which left little room for the legal regulation of (what we now refer to as) hate speech, including:

> i) a relatively broad conception of the category of 'free speech'—that is, communication which should, as a matter of principle, be immune from legislative curtailment;
>
> ii) the view that only the federal Parliament, and not a provincial legislature, was constitutionally entitled to enact laws which restricted freedom of speech (including press freedom); and
>
> iii) the 'subsection two free speech rider', which was a standard inclusion in provincial discriminatory signs and symbols/hate speech laws, was regarded as a major constraint on the scope of the legislative restriction.

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disguised manoeuvre to make the non-French the economic keepers of the French" (*The Daily Gleaner, supra* note 35, at 13).

[38] *Ibid.* at 3.

[39] Note that even if the Board of Inquiry had considered the complaint on its merits rather than rejecting it on spurious grounds, it is likely that the complaint would still have failed at the first hurdle: a newspaper 'letter to the editor' is unlikely to have been regarded as "any notice, sign, symbol, emblem or other representation" (s.6). See *Warren and Chapman* [*Winnipeg Sun 3*], *infra* note 186; *Human Rights Commission v. University of Saskatchewan Engineering Students' Society* [*Red Eye 2*], *infra* note 210 (both discussed below, Part 4.2).

While these themes have recurred with some regularity over the years, they have certainly not been approached or resolved in a consistent fashion. As the following discussion of another of the early adjudications reveals, some decision-makers have unequivocally embraced the legitimacy of legislative prohibitions on discriminatory signs and symbols. Consequently, these decision-makers have been willing to adopt a broad interpretation of the scope of the legislation, and to interpret ambiguous phrases (such as '*indicates* discrimination') in a manner which has the potential to include within the net of Ontario model legislation conduct that contributes to the broader social context of negative attitudes towards particular groups, thereby indirectly creating an increased risk of discriminatory behaviour. However, even where this approach has been taken, the scope of provincial legislation based on the Ontario model has been unavoidably restricted by the fact that it applies only to particular modes of communication (that is, signs and symbols etc.).

Sambo's Pepperpot (*Singer v. Iwasyk and Pennywise Foods Ltd.*)[40]

Two years after the New Brunswick Board of Inquiry handed down its decision in *The Daily Gleaner*, the Saskatchewan Human Rights Commission was called upon to adjudicate on a complaint lodged under the prohibition on discriminatory signs and symbols in s.4 of the *Fair Accommodation Practices Act* 1965.[41] The complainant, Barry Singer, alleged that the respondents, who operated a restaurant in Creighton, Saskatchewan called "Sambo's Pepperpot", had breached s.4 by displaying a sign on the restaurant which showed "a caricature of a small person with black or brown skin colour wearing a Chef's hat and a grass skirt and bearing the words 'Sambo's Pepperpot'".[42] The caricature also appeared on advertising (including bumper stickers and matchbooks) along with the words, "Jez Aint None Better".[43] The Commission agreed with the complainant that the signs were unlawful because they "indicated discrimination":

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[40] *Singer v. Iwasyk and Pennywise Foods Ltd.* (5 November 1976), Saskatchewan (Saskatchewan Bd. Inq.) [Sambo's Pepperpot].
[41] R.S.S. 1965, c. 379.
[42] *Supra* note 40 at 1.
[43] *Ibid.*

> The Commission feels it is proper to ask the following question: "Would the representation of blacks as childish, funny, emasculated, inferior, as described by the witnesses, indicate discrimination?"
>
> To put it another way, it is not only a question of whether a black person would feel humiliated or be insulted by this representation, but the question of whether or not such a person's rights to equal treatment in housing and public accommodation would be affected.
>
> It seems to us that to ask the question is to answer it. If a stereotypical image of a certain class of persons as incompetent, childish and funny is allowed to be displayed, the opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.
>
> The effect of such a caricature is to reinforce prejudice against blacks and as a consequence to prolong the existence of hangovers of prejudice against non-white minority groups in Canada. It also promotes a negative image about blacks.[44]

In defending its ascription of a broad definition to the phrase "indicating discrimination" the Commission observed that the phrase must have been intended by the legislature to cover harmful effects in addition to those covered by the phrase "indicating an intention to discriminate". It cited as examples of the latter, signs which stated that "Blacks Will Not Be Served Here" or "Whites Only", and continued:

> On the other hand, a poster, drawing, cartoon or other similar representation, in words or otherwise, depicting blacks as inferior to white persons, would disclose a discriminatory predilection, belief or attitude, and thereby indicate discrimination against blacks but would not necessarily indicate an intention to discriminate.[45]

There is an implicit acknowledgement in the Commission's reasons that the meaning of the phrase "indicating discrimination" is not self-evident and that it may not have been the best choice for capturing the nature of the harmful effects of racist signs and symbols at which the legislation restriction is directed. However, the Commission recognised that it was being called on to interpret a provision, which, although operative in most provinces, had not previously been subjected to judicial or quasi-judicial interpretation,[46] and took the position that it was obligated

> …to adopt a liberal interpretation of the law in order to fulfill the legislative objective as set forth in Section 7(a) of *The Saskatchewan*

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[44] *Ibid.* at 4.

[45] *Ibid.* at 6.

[46] There was no mention of the decision handed down two years earlier in *The Daily Gleaner*, *supra* note 35.

> *Human Rights Commission Act* [R.S.S. 1972, c. 108], namely to: '(a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, religion, sex, nationality, ancestry or place of origin.'[47]

William Iwasyk and Pennywise Foods Ltd. were ordered to remove the "Sambo" caricature and the name "Sambo's" from the restaurant sign, and to refrain from using the caricature and name in operating the restaurant in Creighton or elsewhere in Saskatchewan.[48]

The nature of the conduct in question in *Sambo's Pepperpot* was such as to fit squarely with the 'signs and symbols' category, and so the implications of the legislation's narrow focus on such modes of communication was left for another day. However, another apparent constraint within the legislation—the focus on *discriminatory* consequences—was in fact, interpreted broadly, promising to offer a relatively broad level of protection, at least in terms of the harmful effects of the conduct in question.[49] However, any assumption that *Sambo's Pepperpot* settled all outstanding questions regarding the scope and validity of provincial discriminatory signs and symbols laws was shown to be ill-founded by events in British Columbia a few years later. In particular, *Hunky Bill* (discussed below) revealed that reservations about the propriety of legal restrictions on even narrowly defined modes of 'speech' or communication of the type voiced in the *Daily Gleaner*, were not limited to New Brunswick; they were manifested in British Columbia in a narrow reading of the "indicates discrimination" component of the definition.

The KKK in British Columbia, the McAlpine Report and Hunky Bill[50]

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[47] *Supra* note 40 at 7.

[48] *Ibid.*, order at 1,2. The respondents appealed unsuccessfully against the Commission's decision on various procedural grounds: see *Re Iwasyk and Human Rights Commission of Saskatchewan,* [1977], 6 W.W.R. 699, (1977) 80 D.L.R. (3d) 1 (Sask QB); *Iwasyk and Pennywise Foods Ltd. v. The Saskatchewan Human Rights Commission,* [1978] 5 W.W.R. 499, (1978) 87 D.L.R. (3d) 289 (Sask CA).

[49] More than 20 years later in *Red Eye 2* (*Infra* note 208, discussed below, Part 4.2) Cameron J.A. in the Saskatchewan Court of Appeal commented on the Board of Inquiry decision in *Sambo's Pepperpot* at 620: "Without suggesting the board erred in doing so, it certainly gave s.4 of the *Fair Accommodation Practices Act* a generous interpretation".

[50] See *infra* note 60.

The inherent limitations of the standard 'Ontario model' prohibition on discriminatory signs and symbols as a legal mechanism for regulating hate were illustrated by a series of events in British Columbia in the early 1980s.

In 1980 the Ku Klux Klan began to work actively in Vancouver. In October 1980 Alexander McQuirter, one of the KKK's chief organisers in Canada appeared on a Canadian Broadcasting Corporation (CBC) program and made a number of racially vilifying comments. For example, he observed that one of the Klan's 'beliefs' was that "God created different races and put them in different parts of the world, and we feel it's evil and unchristian to race mix them...".[51] McQuirter explained that the Klan advocated a program whereby "all the money we've spent on the multi-racial crap already" could be used to "voluntarily repatriate…non-whites" to the "land of their origin".[52] He claimed to be "standing up for white people because whites are now facing reverse discrimination in this country ...".[53]

McQuirter's comments prompted calls for legal redress. One complainant sought the British Columbia Attorney General's consent for a prosecution under the *Criminal Code*'s hate propaganda provisions. Other complainants alleged that McQuirter and the KKK had contravened various sections of the British Columbia *Human Rights Code* 1979, including the s.2 prohibition on discriminatory signs and symbols, which at the time, provided that:

> (1) No person shall publish or display before the public, or cause to be published or displayed before the public, a notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons in any manner prohibited by this Act.

In March 1981 the Minister of Labour (J.H. Heinrich) appointed John McAlpine to "determine whether there was sufficient evidence against the Ku Klux Klan of its contravention of the *Human Rights Code*…to warrant the appointment of a board of inquiry."[54] McAlpine concluded that "the Ku Klux Klan has not contravened the *Human Rights Code*, the reason being that the current provisions of the *Code* are framed too narrowly."[55]

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[51] McAlpine, *supra* note 24 at 4.
[52] *Ibid.* at 4.
[53] *Ibid.* at 5.
[54] *Ibid.* at 1.
[55] *Ibid.*

McAlpine observed that s.2 "is the only section that affords any possible basis for proceeding against the Klan".[56] However, for a number of reasons he concluded that the conduct of McQuirter and the Klan could not be considered a contravention of the section. First, it was limited to particular modes of representation. In McAlpine's view these did not include literature or statements made on television or radio.[57] Second, subsection 2 (that is, a version of the standard free speech rider) necessitated a narrow reading of subsection 1.[58] Third, and most important, the words "in any manner prohibited by this Act", "were intended to limit the scope of section 2 by tying that section directly to the proscribed areas of discrimination."[59]

McAlpine's assessment of the limitations of s.2 was prescient (or influential!). The operation and scope of s.2 of the Human Rights Code 1979 was considered for the first time by a Board of Inquiry in 1982 in the case of *Ukrainian Canadian Professional and Business Association of Vancouver v. William Konyk and Winnipeg Garlic Sausage Co. Ltd*.[60] The case arose out of a complaint lodged by the Ukrainian Canadian Professional and Business Association of Vancouver with the British Columbia Human Rights Council which alleged that Konyk had breached s.2(1) by displaying the name "Hunky Bill" on business signs, advertisements, publications, commercial items and vehicles promoting his restaurants and food concessions.

Before the Board of Inquiry Konyk explained that he had been nicknamed "Hunky Bill" in high school, and that he had continued to use the name ever since. "Hunky Bill" was the registered trade name under which he operated his food-related business. The complainant claimed that, even in these circumstances, the public display of a derogatory ethnic name like "hunky" constituted discrimination against members of the Ukrainian Canadian Professional and Business Association of Vancouver, and persons of Ukrainian descent in British Columbia.

The Board accepted that the term was regarded by many as a pejorative and offensive term used to refer to immigrants from east-central Europe and found that "the term 'hunky' stands in the same class of collective nouns such as 'chink', 'wop',

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[56] *Ibid.* at 58.
[57] *Ibid.*
[58] McAlpine may have over-stated the effect of the sub-section two rider: see *Kane v. Church of Jesus Christ Christian-Aryan Nations* [*Kane*], *infra* note 91.
[59] McAlpine, *supra* note 24 at 58.
[60] (1982), 3 C.H.R.R. D/1157 (B.C. Bd. Inq.) [*Hunky Bill*]

'mick', 'paddy', 'goolle' etc."[61] However, the Board of Inquiry ruled that the respondent's display of the name "Hunky Bill" did not constitute a violation of s.2 of the B.C. *Human Rights Code*. The Board emphasised that s.2 did not render unlawful conduct which was offensive; it "…only prohibits signs that indicate discrimination or intent to discriminate in the manner prohibited by the *Human Rights Code* itself."[62] Accordingly, s.2 did not create an offence in itself and had to be read in light of other provisions of the *Code*, and, most relevantly, s.3:

> (1) No person shall …
>
> (b) Discriminate against a person or class of persons with respect to any…service or facility customarily available to the public, unless reasonable cause exists for the denial or discrimination….

The Board distinguished the Saskatchewan Board of Inquiry decision in *Sambo's Pepperpot*, primarily on the basis that the equivalent legislation in Saskatchewan was broader in terms, covering any form of discrimination.

The Board of Inquiry found no evidence of discrimination as defined in s.3, concluding that "[t]he evidence is that while the vast majority of Canadian/Ukrainian background might find the name offensive, nevertheless they are free to use the restaurant and indeed, many do."[63] In response to the complainant's submission that many people of Ukrainian descent refrain from using "Hunky Bill" restaurants because they refuse to "patronize a restaurant [in] which they felt belittled and discriminated against…",[64] the Board of Inquiry concluded that such "subjective discrimination" was distinct from the "discrimination in an objective legal sense" which is prohibited under the *Code*.[65]

The Board of Inquiry dismissed the complaint, concluding that it did "not fall within the category of the mischief, which the legislature in passing the *Human Rights Code*, was endeavouring to suppress."[66] An appeal to the British Columbia Supreme Court was unsuccessful. Macdonell J. held that the Board of Inquiry had correctly interpreted and applied s.2. Specifically Macdonell J. upheld the Board of Inquiry

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[61] *Ibid*. at D/1159.
[62] *Ibid*. at D/1161.
[63] *Ibid.*
[64] *Ibid.* at D/1162.
[65] *Ibid.*

finding that "s.2 of the *Human Rights Code* does not create a substantive offence standing by itself."[67]

It is a moot point as to whether the outcome in *Hunky Bill* can be defended on the basis of the wording of s.2 of the *Human Rights Code*. Certainly, the approach adopted by the Board of Inquiry, and endorsed by the Supreme Court, seemed to leave very little room for the operation of s.2 in relation to conduct which the general s.3 prohibition on discrimination did not already cover.

Whatever its specific merits, or broader significance in the history of Canadian hate speech laws, the immediate effect of *Hunky Bill* was that it confirmed McAlpine's assessment that the *Human Rights Code* prohibition on discriminatory signs and symbols was not a form of legal redress from which victims of hate speech in British Columbia could expect much assistance.[68]

Perhaps the most interesting aspects of the decision are those passages where the Board indicated that its preference for a very narrow interpretation of s.2 of the *Code* was motivated by broader reservations regarding the use of legislative prohibitions as a mechanism for dealing with racist speech, and about the role of law in advancing human rights more generally (reminiscent of the views expressed by the New Brunswick Board of Inquiry in *The Daily Gleaner*). In *Hunky Bill*, the Board observed:

> There is no doubt…that the use of the term "hunky" or any other that offends deeply held feelings, is to be discouraged.
>
> That is not to say that such terms either are or should be prohibited by law. To attempt to do so would be to choke freedom in the name of liberty....
>
> Perhaps people should learn to laugh at themselves more and take themselves less seriously. Perhaps that way, there would be less discrimination.

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[66] *Ibid.*

[67] *Ukrainian Canadian Professional and Business Association of Vancouver v. Konyk and Winnipeg Garlic Sausage Co Ltd.,* [1983] 6 W.W.R. 204 at 206, (1983) 149 D.L.R. (3d) 763 (BCSC) [cited to W.W.R.]. Macdonell J. also rejected the argument advanced by the appellant that the word "discrimination" should be interpreted broadly to include "signs that may offend the dignity and pride of persons of Ukrainian descent without any act of discrimination or prejudiced treatment of the group" at 207.

[68] Section 2 of the *Code* remained unaltered in the *Human Rights Act* 1984, which superseded the 1979 *Human Rights Code*, and was retained until 1993, when the British Columbia legislature replaced it with a broader prohibition on hate speech (see below, part 3.2).

> When Dr. Kehoe [an expert witness called by the complainant] advocated changing the law to change behaviour, he implied that changes can be meaningfully made by compulsion. I wonder if he is right. Human rights, like the work ethic, are surely not matters of law, not of compulsion, but of culture. A tolerant society can only be brought about through education, rather than compulsion.[69]

Although these comments on the limits of law when it comes to the protection of human rights are more explicit than is usual in a quasi-judicial adjudication context, it would be naïve to think that this was the only occasion on which an adjudicator has brought to bear on a decision in an individual case his or her personal philosophy of the relationship between law, rights, and freedom. Indeed, in the context of adjudication on provincial hate speech laws, such influence is a recurring feature of many decisions. As a result, because of the diverse range of views on the preferred breadth of rights such as the right to free speech, there has been a degree of inconsistency across the provinces in the approach adopted to the interpretation and application of civil restrictions on hate speech, and in the case-by-case negotiation of the line between unlawful hate speech and protected expression.

This point is well made by contrasting the decision in *Hunky Bill* with two cases from Nova Scotia, in which the decision-makers exhibited considerably greater sympathy for the spirit and goals of human rights legislation, leading them to make the most of the limited discriminatory signs and symbol prohibition as a mechanism for extending protection to victims of racism and negative stereotypes.

The Nova Scotia Cases: Rasheed and the Black United Front of Nova Scotia v. Bramhill[70] *and The Association of Black Social Workers and Thomas-Bernard v. Arts Plus and Daoud*[71]

Two public inquiry decisions have been handed down under the discriminatory signs and symbols provision currently found in s.7 of the Nova Scotia *Human Rights Act* 1989. Decided on either side of British Columbia's *Hunky Bill* (in 1980 and 1994, respectively), what is most significant about these decisions is that both resulted in the complaint being upheld. In both cases, this outcome resulted from a relatively broad interpretation of the scope of the legislative restriction on discriminatory signs and

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[69] *Supra* note 60, at D/1161.

[70] (1981), 2 C.H.R.R. D/249 at D/250l (N.S. Bd. Inq.) [*Bramhill*]

symbols in Nova Scotia's human rights legislation. These decisions underscore the fact that in those jurisdictions where there is no legislative provision dealing generally with the promotion of hatred or contempt, adjudicators may feel considerable pressure to adapt the tools at their disposal (that is, ostensibly narrow restrictions on discriminatory signs and symbols) where the conduct that is the subject of the complaint is regarded as contrary to the spirit of human rights legislation. The ambiguity of the phrase "indicates discrimination" lends itself to such adaptation. However, it is questionable whether it should be necessary for adjudicators to expose themselves to potential criticism for overly broad interpretations of the relevant legislative provisions in order to avoid failing to provide a remedy to a deserving complainant.

Bramhill

In July 1980 a complaint was lodged with the Nova Scotia Human Rights Commission by Hamid Rasheed on behalf of The Black United Front of Nova Scotia alleging that the respondent, Barry Bramhill had contravened the prohibition on discriminatory signs and symbols which, at the time, was contained in s.12 of the *Nova Scotia Human Rights Act* 1969[72]:

> (1) No person shall publish, display or broadcast, or permit to be published, displayed or broadcast on lands or premises, or in a newspaper or through a radio or television broadcasting station or by means of any other medium, any notice, sign, symbol, implement or other representation indicating discrimination or an intention to discriminate against a person, or class or person for any purpose.

Bramhill had published and distributed buttons which carried a photo of a Black person accompanied by the words "I'm a Big Mouth Cape Bretoner - So Kiss Me".

The Board of Inquiry held that the publication and display of the button and card did violate the legislation prohibition on discriminatory signs and symbols. The Chairman rejected the respondent's submission that the representation did not indicate discrimination:

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[71] (29 March 1994), Nova Scotia (N.S. Bd. Inq.) [*Arts Plus*].
[72] R.S.N.S. 1969, c. 11.

> The Respondent argues that offensiveness or bad taste is not sufficient and that the button in the case before us, does not draw unwarranted or invidious distinctions between Blacks or anyone else. I cannot agree. Using the definition cited by the Respondent, an invidious distinction means one that is 'likely to draw discontent or animosity, of an unpleasant or objectionable nature, hateful, obnoxious, causing harm or resentment' (Webster's Third New International Dictionary). The button, in combination with the card, conveys the idea that Black persons in general or female Black persons in particular, are loud and stupid. The button thus emphasized a distinguishing characteristic of a negative type. Taken in the historical context of the Black as a racial minority, it goes beyond bade taste and mere offensiveness. Such a statement might, for example, very well tend to activate latent prejudice and indirectly affect employment opportunities for Blacks.[73]

In support of this interpretation of the scope of the s.12 prohibition on discriminatory signs and symbols, the Nova Scotia Board of Inquiry cited with approval the 1976 decision of the Saskatchewan Board of Inquiry in *Sambo's Pepper Pot*. Consistent with this decision, and in stark contrast to the approach adopted by the British Columbia Board of Inquiry in *Hunky Bill*, in *Bramhill* the Board of Inquiry expressly adopted a liberal interpretation of the breadth of the prohibition in s.12, on the basis that Nova Scotia's human rights legislation was "designed to secure the rights of citizens to non-discriminatory conduct".[74]

Bramhill was ordered to make a written apology including an assurance that he would comply with the *Human Rights Act* in the future. He was also ordered to hand all remaining buttons over to the Nova Scotia Human Rights Commission for destruction.[75] The Board of Inquiry ruled that the complainant's request for damages should be denied "[b]ecause the evidence clearly shows that Mr. Bramhill did not have an intention to discriminate against Black persons by distributing the button ...".[76]

Another significant feature of the decision in *Bramhill* is that the Board of Inquiry was required to consider the validity of the legislation, in response to the respondent's argument that "[s]ection 12(1) is beyond the legislative competence of the Provincial Legislature to the extent that it affects freedom of speech."[77] The Nova Scotia Board of Inquiry rejected this argument on two bases:

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[73] *Supra* note 70 at D/250.
[74] *Ibid.* at D/251.
[75] *Ibid.* at D/252.
[76] *Ibid.*
[77] *Ibid.* at D/251.

First, citing the decision of the Supreme Court of Canada in *Attorney-General for Canada v. Dupont*[78] the Board noted that "[f]reedom of speech is neither a Federal nor a Provincial matter exclusively; whether a law is ultra vires [or] not, must be determined by its pith and substance."[79] The *Nova Scotia Human Rights Act*, including s.12, was valid because it was essentially concerned with "Property and Civil Rights", which is within the constitutional authority of the provinces under s.92(13) of the *Constitution Act* 1867.[80]

Second, the Board of Inquiry in *Bramhill* emphasised that freedom of speech is not absolute:

> In particular cases, the right of free speech may have to give way to other human rights, such as the right not to be discriminated against, so that although the law infringes the right to freedom of speech, it does not inviolate it and it is, therefore, not unconstitutional.[81]

The Board noted that the free speech 'rider' in s.12(2) needed to be understood in this context, and not interpreted as "imposing an absolute limit" on s.12(1).

In its disposal of the respondent's free speech objections, and its adoption of a broad interpretation of the prohibition on discriminatory signs and symbols, the decision of the Nova Scotia Board of Inquiry in *Bramhill* occupies an important position in the history of Canadian provincial laws restricting various forms of hate speech—a position which may be regarded as at the opposite end of the spectrum to the decision in *Hunky Bill*.

Arts Plus

In October 1992 the Association of Black Social Workers and Wanda Thomas-Bernard lodged a complaint with the Nova Scotia Human Rights Commission which alleged that the graphic displayed on sweatshirts sold by Mike Daoud in his "Arts Plus" store violated the prohibition on discriminatory signs and symbols in s.7 of the Nova Scotia *Human Rights Act* 1989.

The content of the graphic is most easily conveyed by reciting the description offered in the decision of the Board of Inquiry:

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[78] (1978), 2 S.C.R. 770.
[79] *Supra* note 70 at D/250, D/252.
[80] (U.K.), 30 &31 Vict., c. 3, reprinted in R.S.C., 1885, App. II, No. 5.
[81] *Bramhill*, *supra* note 70 at D/252.

> The ... [sweatshirt] is white in colour, and is plain with the exception of an approximately 10" by 9" rectangular area on he front portion of sweatshirt where a scene is depicted. The scene is of a bedroom containing a steel-framed bed, a pinkish/reddish light bulb hanging from a lighting fixture from the ceiling, cracked walls, and a mouse lying on the floor, laughing. The predominant feature of the scene is a rear view of a black woman with a large buttocks wearing nothing but high heeled shoes and stockings, carrying a bottle and heading toward the bed. Between the two sides of the woman's buttocks is a white male who appears trapped in the buttocks. The black woman appears to be looking for the white male, and the words depicted below the scene are 'Harold... Harold..? I'm ready for you...'.[82]

After investigation (during which time Daoud removed the sweatshirts from display having previously refused to do so upon request from Bernard and others), the Nova Scotia Human Rights Commission appointed a Board of Inquiry on 7 July 1993.

During the inquiry, Dr. Sherene Razack, an expert in race and gender issues, was called by the Nova Scotia Human Rights Commission. Dr. Razack testified that "the sweatshirt was part of an accumulation of discrimination...that a black woman is seen by society as a prostitute, as animal like, and as degraded or inferior" and that the sweatshirt "caused great harm as it was a very powerful reminder of the thoughts it was portraying."[83] The respondent, Daoud, countered that he had not specifically ordered the Harold sweatshirts—they had arrived as part of an order of a variety of sweatshirts filled by a supplier in Ontario. He gave evidence that some of the sweatshirts had even been sold to black customers.

The Board concluded without discussion that the image fell within the statutory definition of a representation, and that the sweatshirt when displayed in the Arts Plus Store was a 'medium' for the purposes of s.7. For the Board of Inquiry the only legal issue was whether the graphic indicated discrimination or an intention to discriminate on one of the prohibited grounds.

Section 4 of the Nova Scotia *Human Rights Act* 1989[84] defines discrimination in the following way:

> For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations, or disadvantages on an individual or a class of

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[82] *Arts Plus, supra* note 71 at 3.

[83] *Ibid.* at 6.

[84] R.S.N.S. 1989, c. 214.

> individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

In addressing this issue the Board of Inquiry considered the earlier Nova Scotia Board of Inquiry decision in *Bramhill*,[85] as well as the decision of the Saskatchewan Board of Inquiry in *Sambo's Pepperpot*.[86] Following the approach adopted by the Nova Scotia Board of Inquiry in *Bramhill*, the Board held in *Arts Plus* that the representation on the sweatshirt was discriminatory:

> ...[I]t is my conclusion that the Harold Sweatshirt, by depicting Black women as overly sexual and impoverished, makes a distinction based on race and/or colour and or sex which conceivably influences opportunities, benefits and advantages available to this group.[87]

The Board noted that the evidence indicated that the respondent had not intended to discriminate, but reiterated the view expressed in *Bramhill* that the prohibition on racially discriminatory representations could be contravened even in the absence of intention. That is, the prohibition applies to (i) representations that (objectively) indicate discrimination; and (ii) representations which (subjectively) indicate an intention to discriminate. However, while the absence of intention on the part of the respondent in this case was irrelevant to the question whether he had contravened the first tire of the s.7 prohibition, the Board of Inquiry considered that his lack of intention made an award of damages inappropriate. The Board of Inquiry ordered that the respondent apologise in writing to the complainants, and "[c]ease displaying and/or offering for sale the Harold Sweatshirts, and any other material which is discriminatory."[88]

There is a very clear difference between the approach of the British Columbia Board of Inquiry in *Hunky Bill*, and that of the Nova Scotia Boards of Inquiry in *Bramhill* and *Arts Plus*; a difference which cannot be fully explained by factual differences or variations between the respective provincial statutes. Rather, the contrast reveals two competing sets of values regarding the desirability and appropriateness of legislative restrictions on hate speech, and highlights the impact that the personal views of adjudicators can have on the outcome of individual

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[85] *Supra* note 70.
[86] *Supra* note 40.
[87] *Supra,* note 71 at 10.
[88] *Ibid.* at 11.

complaints. This is particularly evident in an environment where there is ongoing debate about the merits of legislative restrictions on hate speech, the statutory language employed is relatively vague and flexible, and there is limited jurisprudence or judicial guidance on the interpretation of the legislative prohibition in question.

In this context, it is important to consider how the Supreme Court of Canada's early 1990s articulation of the parameters of the right to freedom of expression, and confirmation of the constitutional validity of legislative restrictions on hate speech has impacted on the way in which provincial adjudicators approach the task of determining the merits of alleged breaches of legislative restrictions on various forms of hate speech, and constructing the boundaries of unlawful hate speech. Surprisingly, there was no consideration of the leading 1990 Supreme Court of Canada decisions[89] in the 1994 *Arts Plus* decision, but they figured prominently in the first of two Board of Inquiry decisions handed down in relation to the prohibition on discriminatory signs and symbols which operated in Alberta from 1972 until 1996.[90]

Alberta

Kane v. Church of Jesus Christ Christian-Aryan Nations[91]

In December 1990 Harvey Kane lodged a complaint with the Alberta Human Rights Commission. Six other people subsequently lodged complaints in relation to the same conduct. The complainants alleged that the respondents, Terry Long (the Canadian leader of a white supremacist organisation called the Church of Jesus Christ Christian-Aryan Nations) and Ray Bradley, had contravened s.2(1) of the (then) Alberta *Individual's Rights Protection Act*.[92] At the time, the relevant portions of s.2 provided that:

> (1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person because of the race,

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[89] *Keegstra, supra* note 3; *Taylor, supra* note 4.

[90] In 1996, a broader hate speech prohibition was added to the re-named *Human Rights, Citizenship and Multiculturalism Act,* R.S.A. 1996, c. 25 (see below, part 4.2).

[91] (1992), 18 C.H.R.R. D/268 (Alberta Bd. Inq.) [*Kane*].

[92] R.S.A. 1972, c. 2. [*IRPA*].

> religious beliefs, colour, physical disability, age ancestry or place of origin of that person or class of persons.
>
> (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

The conduct in question took place at an outdoor 'Aryan Fest' meeting organised by the Church of Jesus Christ Christian-Aryan Nations at a farm (owned by Ray Bradley) near the town of Provost, Alberta on 8-9 September 1990. It consisted of the display of a Swastika flag and a sign that said "KKK White Power", the wearing of Nazi uniforms and swastika armbands, the burning of a thirty feet tall cross, the giving of the "Nazi salute", shouts of "Death to the Jew", "White Power" and "*Sieg Heil*", the wearing (by Terry Long) of a hat with a Confederate flag emblem accompanied by the words "White Pride", and the wearing of white T-shirts as "shrouds". Two of the complainants (including Kane) were present in Provost on the day. The other complainants saw newspaper and television coverage of the event.

On 12 June 1991 a Board of Inquiry was appointed to inquire into the complaints of a contravention of s.2(1). The Board held that the respondents had contravened the prohibition on the display of discriminatory signs and symbols.[93]

The Board had no difficulty in concluding that the Swastika, the burning cross and the "White Power" sign were *displayed* by the respondents and that these modes of representation fell within the definition of "symbols" (and "signs" in the latter case). The Board rejected the respondents' argument that because the 'display' took place on private property s.2(1) of the *IRPA* was not applicable. The issue was whether the events were "before the public". According to the Board, the evidence showed that

> ...many of the events which took place during the Aryan Fest were 'open to general observation' [a dictionary definition of "public"]. The Board finds that members of the public who were on the road next to the Bradley property had a clear view of the 'burning cross', 'Swastika' and 'KKK White Power' sign. The persons who attended as protestors the media representatives and the persons using the road to go to the dump, could see the prominently displayed signs and symbols.[94]

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[93] *Supra* note 91 at D/302.

[94] *Ibid.* at D/291.

The Board further supported its conclusion that the display was "before the public" by concluding that the 'Aryan Fest' was not a private event, but was attended by some "members of the public."[95]

In concluding that the display "indicated discrimination" the Board held that as a matter of law, "there does not have to be actual act of discrimination for there to be an indication of discrimination",[96] nor was it necessary to establish that the display was accompanied by an *intention* to discriminate. In adopting this interpretation of the statute the Board relied on the decisions in *Sambo's Pepperpot*[97] and *Bramhill*.[98] Further, the prohibition applied to discrimination "for any purpose"[99]—it was not limited to "the particular modes of discrimination enumerated in the *IRPA*."[100] In reaching this conclusion the Alberta Board of Inquiry noted that "[t]he *IRPA* is not worded as restrictively as the B.C. *Code*",[101] and on this basis distinguished *Hunky Bill*.[102]

The Board of Inquiry upheld the complaint and ordered that the respondent refrain from future displays of the discriminatory signs and symbols in question. The Board noted that this was "the strongest order we are allowed to make, limited as our powers are, under the *IRPA*."[103]

The Alberta Board of Inquiry decision in *Kane* was one of the first cases under a provincial human rights statute to be decided after the decisions of the Supreme Court of Canada in *R v. Keegstra*[104] and *Taylor v. Canadian Human Rights Commission*.[105] As in the case of *Saskatchewan (Human Rights Commission) v. Bell*[106] (see below, part 4.2), the Supreme Court's analysis in these two high profile cases, of the relationship between the right to free speech and legislative restrictions on hate speech, had a major impact on the Alberta Board of Inquiry's examination of the significance of the subsection 2 free speech 'rider'—a standard though poorly

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95 *Ibid.*
96 *Ibid.*
97 *Supra* note 40.
98 *Supra* note 70.
99 *Supra* note 91 at D/295.
100 *Ibid.*
101 *Ibid.*
102 *Supra* note 60.
103 *Supra* note 91 at D/303.
104 *Supra* note 3.
105 *Supra* note 4.
106 *Infra* note 220.

understood inclusion in provincial human rights statutory provisions dealing with discriminatory signs and symbols and hate speech.

The Board commenced its analysis of this issue by noting that the sub-section two rider was almost 50 years old (having first appeared in the 'prototype' Ontario *Racial Discrimination Act* 1944[107]) and predated a bill of rights and the *Canadian Charter of Rights and Freedoms*.[108] In support of its view that s.2(2) did not provide an exemption or defence, the Board cited with approval the interpretations of equivalent provisions preferred in *Bramhill* (discussed above), *Warren and Chapman*[109] (discussed below in Part 4.2), and the academic commentary of Tarnopolsky, who had concluded that the standard 'sub-section two free speech rider' was "probably superfluous".[110] The Board endorsed the conclusion of Dickson C.J.C. in *Taylor*[111]:

> Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression.[112]

On the one hand, the decisions in *Kane* and *Taylor* appeared to have settled what had long been a source of debate—whether subsection 2 offered an exemption to respondents who were found to have breached subsection 1. However, the now authoritative interpretation opened up a new debate: what does it mean to balance the competing rights, and how should adjudicators approach the task of balancing?

Despite expressing reservations about whether "the 'admonition' to balance"[113] in s.2(2) required the deployment of an elaborate legal test, the Board decided, "out of an abundance of caution" to apply the *Oakes* test,[114] which had been applied by the

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[107] See *supra* note 22.

[108] *Charter, supra* note 5.

[109] [*Winnipeg Sun 3*], *infra* note 190

[110] Tarnopolsky, *supra* note 23 at 338, cited *supra* note 91 at D/297.

[111] *Supra* note 4. These comments were made by the Chief Justice in the course of rejecting Taylor's argument that the absence of a 'free speech rider' in s.13 of the *Canadian Human Rights Act* 1977 was a reason why the prohibition on repeated discriminatory telephone messages should be regarded as overbroad and therefore unconstitutional as an unjustified infringement of the right to free speech in s.2(b) of the *Charter*.

[112] *Kane,* supra note 91 at D/297.

[113] *Ibid.* at D/298.

[114] *R v. Oakes* [1986] 1 S.C.R 103, S.C.J. No.7 at 138-139. The *Oakes* test requires the court to consider two issues. First, is the objective of the legislation "of sufficient importance to warrant overriding a constitutionally protected right or freedom…"? (*ibid* at 138) Second, are the means adopted to achieve this objective "reasonable and demonstrably justified"? (*ibid* at 139). According to Dickson C.J. this second question requires consideration of whether: (i) the means are "rationally

Supreme Court of Canada in relation to the hate speech provisions in s.319 of the Canadian *Criminal Code* (*Keegstra*[115]) and s.13 of the *Canadian Human Rights Act* (*Taylor*[116]). The Alberta Board relied heavily on the Supreme Court of Canada's analysis of these federal provisions in reaching its conclusion that the objective of s.2(1) of the Alberta legislation was sufficiently important to limit the right to free speech, and that the prohibition contained in s.2(1) was a proportionate response.[117]

Kane was not a 'borderline' case in which the Board had to make a hard decision as to whether the conduct in question was sufficiently harmful to warrant legislative sanction. Indeed, the Board described the 1990 Aryan Fest as:

> …a shocking event in the history of Alberta. The blatant display of signs and symbols redolent of racial and religious hatred, bigotry and discrimination challenge the very foundations of our society.[118]

In the circumstances, very little turned on how the Board chose to articulate free speech sensitivity into the adjudication process. However, in subsequent decisions in Alberta and other Canadian provinces (see below, section 3), the style of analysis endorsed by the Alberta Board of Inquiry has emerged as a complex site of contestation. This has tended to impact negatively on the achievement of certainty, clarity and consistency with respect to the reach of legislative restrictions on expression.

Since *Kane,* decisions relating to alleged violations of provincial hate speech restrictions have been made very much in the shadow of *Taylor* and *Keegstra*. From the perspective of those victims of hate speech seeking legal redress, this shadow has been beneficial, to the extent that it has meant, for the most part, that the question of the constitutional validity of prohibitions on discriminatory signs and symbols in provincial human rights legislation has been largely settled.[119]

On the other hand, as will be discussed below in Part 4, this context may have contributed to the presence of an undesirable element of unpredictability in the

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connected to the objective;" (ii) the means "impair 'as little as possible' the right or freedom in question"; and (iii) there is "proportionality between the effects of the measures…and the objective…" (*ibid.* at 139).

115 *Supra* note 3.

116 *Supra* note 4.

117 *Kane, supra* note 91 at D/300.

118 *Ibid.* at D/302.

119 Some respondents have continued to (unsuccessfully) challenge the constitutional validity of legislation in those jurisdictions which have enacted broader hate speech prohibitions: see, e.g., *Bell 2, supra* note 220; *Abrams v. Collins*, 2001 B.C.H.R.T. 43; and discussion below (part 4.2).

decision-making process. Even when the validity of the legislation is not challenged on free speech grounds, or when any such challenge is quickly dismissed, adjudicators now commonly take into account free speech considerations when determining the breadth of the legislative prohibitions on discriminatory and hateful communication. This has resulted in divergent outcomes with respect to the 'shape' given to the legislative restrictions on communication.

In addition, to further complicate the picture, in some decisions free speech considerations have received very little explicit consideration. This serves to highlight the variety of approaches and unpredictability of outcome that are features of the operation of provincial hate speech laws. The following case is illustrative of this point.

Kane v. The Silver Bullet[120]

Harvey Kane, along with the Jewish Defence League of Canada, was again the complainant in a case involving the distribution in Calgary of several issues of a newsletter titled "The Silver Bullet" by Milan Papez Sr. and Milan Papez Jr.. The newsletters contained numerous diatribes directed at various individuals in public office and community organisations in Alberta, many of whom were alleged to have victimised the Papez family. "The Silver Bullet" included a number of negative generalizations and comments about the Jewish and Chinese communities in Calgary, such as: references to the "Jewish mafia" acting as "Nazis" and controlling "the government and its institutions, banks politicians, newspapers";[121] calls for a number of prominent Jewish lawyers to be "jailed in Auschwitz"; and endorsement of the deportation or mass killing of the Chinese population of Calgary. One issue of "The Silver Bullet" included a picture of a swastika superimposed on the Canadian flag.

Although the matter was not heard by the Alberta Human Rights and Citizenship Commission until 2002, the complaint was originally lodged in 1995. Therefore, it was determined in accordance with the law as it stood at that time—under the prohibition on discriminatory signs and symbols under s.2 of the *Individual Rights*

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120 *Harvey Kane and The Jewish Defence League of Canada v. Milan Papez, Jr., and The Silver Bullet* (13 June 2002) online: Alberta Human Rights and Citizen Commission http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decis_Kane_Silver_Bullet.asp [*Kane 2*].
121 *Ibid.*

Protection Act 1980, rather than the broader prohibition on public communications which promote hatred or contempt which was added in 1996 and which is now contained in the (renamed) *Human Rights, Citizenship and Multiculturalism Act* 2000.

On the threshold question of whether the modes of communication employed by the respondents ("pamphlets, newsletters, letters, memoranda and messages on sandwich board placards…available to the general public in various locations in the City of Calgary"[122]) were covered by the legislation, the Panel adopted an interpretation of the terms "notice" and "other representation" which was significantly broader than the interpretation of equivalent provisions adopted previously in other jurisdictions. These other interpretations had excluded mainstream newspaper opinion editorials (*Winnipeg Sun 3*,[123] discussed below in Part 4.2) and university student newspaper articles (*Saskatchewan (Human Rights Commission) v. Engineering Students' Society*[124] discussed below in Part 4.2). In particular, "representation" was defined, with reference to the other listed modes of communication, to mean "a description, account, or statement of facts, allegations or arguments, especially one intended to influence action, persuade hearers, make protests, etc."[125] Unsurprisingly, given this broad definition, the modes of communication employed by the respondents were regarded by the Panel as falling with s.2(1).

The Panel concluded that by distributing "The Silver Bullet" the respondents had engaged in conduct that indicated discrimination or an intention to discriminate, adopting a relatively broad interpretation of the discrimination component:

> The respondents have elevated a personal cause or vendetta into a public forum involving more than the individuals with whom they have had negative personal interactions. Once in the public forum, they have attempted to empower their cause by inflaming their attacks on individuals and classes of persons by the use of language and image in symbol meant to evoke a strong reaction. They have singled out persons and classes of persons based on religious beliefs, race, ancestry and cultural background. They have utilized

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122 *Ibid.*

123 *Infra* note 190 .

124 *Infra* note 213.

125 As per *Webster's New World Dictionary* (1988), cited in *Kane 2, supra* note 120. It is possible that the Panel was persuaded to adopt this broad definition because the 1996 amendments (although not strictly relevant to this matter) had introduced a modified form of words which clearly included forms of communication such as newspaper articles: see *Human Rights, Citizenship and Multiculturalism Act,* R.S.A. 2000, c. H-14, s.3 ("any statement, publication, notice, sign, symbol, emblem or other representation").

> terms and phrases that they know, or ought to have known, have historical roots of extremely negative, oppressive experiences.
>
> …
>
> The respondents have published and/or displayed powerful indications of discrimination. The words and symbols they have chosen embody past and present religious and racial discrimination.
>
> Furthermore, the respondents have gone beyond simply expressing their own discriminatory views by offering an invitation to discriminate against others.… The repetitive messages are designed to encourage others to join them in their discrimination of Jews and Asians.[126]

The Panel rejected the respondents' argument that they had "a right to express their beliefs in anyway they choose". Consistent with the approach adopted in *Kane,* and relying expressly on the opinion of Rooke J. in *Re Kane*[127] (discussed below in Part 4.2) the Panel held that s.2(2) "provides neither a defence nor a justification for a breach of Section 2(1)", but was "an admonition to balance the competing objectives of freedom of expression and the eradication of discrimination."[128] In concluding that the balance should be struck "in favour of the protection against discrimination"[129] the Panel took into account the extreme language employed by the respondents and the frequency of the communications. Somewhat surprisingly, the Panel also took into account its assessment that the conduct engaged in by the respondents would also breach the prohibition on communications which expose groups to hatred or contempt,[130] which was operative in Alberta at the time of the hearing and decision (but which was not strictly applicable to the case at hand, not being in operation at the time the complaint was lodged in 1995).

The Panel ordered the respondents to refrain from displaying the material in question and to pay the complainant $2,500.

3.3 Conclusions On the Discriminatory Signs and Symbols Model

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[126] *Supra* note 120.
[127] *Infra* note 318.
[128] *Ibid.*
[129] *Ibid.*
[130] *Human Rights, Citizenship and Multiculturalism Act*, *supra* note 125, s.3(1)(b).

A number of general observations can be drawn from this examination of seven decisions handed down in relation to alleged violation of prohibitions on discriminatory signs and symbols in provincial human rights laws.

First, notwithstanding the success enjoyed by the majority of complainants in the small number of matters which have been the subject of adjudication by a board, panel or court, it is clear that the 'Ontario model' prohibition on discriminatory signs and symbols, with its inherent limitations, has only a very marginal role to play as a legal mechanism for dealing with hate speech. Human rights commissions in a number of provinces and territories have expressed dissatisfaction with the limitations of the traditional discriminatory signs and symbols prohibition as a mechanism for responding to hate speech,[131] but only a small number of legislatures have been moved to enact broader legislative restrictions (see below, Part 4).

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[131] For example, concern about the limitations of s.11 of the Quebec *Charter of Human Rights and Freedoms,* R.S.Q. 1975, c. C-12 [Quebec *Charter*] (which states that "No one may distribute, publish or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so") has been expressed on a number of occasions. In 1981 the Commission des droits de la personne du Quebec passed a resolution which "condemned movements that, on the basis of race, colour, ethnic or national origin or religion, perform acts which interfere with the rights of others or incite the performance of such acts" (Commission des droits de la personne du Quebec, *Racist Movements and Incitement of Discrimination: Declaration by the Commission des droits de la personne* (Montreal: Commission des droits de la personne du Quebec, 10 December, 1994) [Declaration]. The Commission called on the Quebec Government to "strengthen the law in order to eradicate all forms of incitement of discrimination" (*ibid*). No change was made to the Quebec Charter at this time. In 1994, prompted by evidence of the rise of racist movements in Quebec, the Commission renewed the call for more effective regulation of racist incitement (Commission des droits de la personne du Quebec, , *Les Mouvements Racistes et la Charte: Document de reflexion* by P. Bosset (Montreal: Commission des droits de la personne du Quebec, 1994)). On 10 December 1994 the Commission issued a declaration which again recommended amendments to the Quebec *Charter*:

> The reappearance of racist movements reflects an international context marked by an upsurge in racist ideologies and practices. This is evident in the appearance of openly racist movements in many societies similar to our own, and by the tragic events in countries that have fallen prey to forms of "ethnic cleansing". Although the resurgence of racist movements remains marginal in Quebec, it nevertheless threatens our social values, and it would be dangerous to look the other way. Racism in whatever form should not be ignored.
>
> In this context, the Commission believes it is necessary to reassert and update the principles contained in the Charter of Human Rights and Freedoms. The Charter is the legal incarnation of Quebec's social values, and its principles are there to guide the actions of our society and inspire the actions of the legislator.
>
> Convinced that the exercise of its mandate to fight racism requires a new legislative provision under which incitement of discrimination would become a civil offence, and in light of the principles of the Charter, the political commitment of Quebec and the measures taken by other Canadian provinces, the Commission recommends that the legislator insert in the Charter a provision to the effect that

Second, despite the limitations of this model, the small number of adjudications have brought to the surface the central underlying tensions surrounding attempts to use the state's legal authority to regulate racism and other forms of negative stereotyping, bias and discrimination. The 'battle lines' of the controversy were settled quickly, with some decision-makers committed to making the most of the limited scope of the legislative restrictions in order to maximize the opportunities for extending protection to victims (e.g., *Sambo's Pepperpot*, *Bramhill*, *Arts Plus*), while others were determined to constrain what they saw as a threat to the important democratic principle of freedom of communication (*The Daily Gleaner*, *Hunky Bill*).

Third, despite divergent opinions and interpretations over the course of two decades, some clarity has emerged, particularly since the 1992 decision of the Alberta Board of Inquiry in *Kane v. Church of Jesus Christ Christian-Aryan Nations*. Most significantly, from the point of view of this article's concern with the relationship between free speech protection and hate speech regulation, by the early-mid 1990's the primary point of uncertainty and disagreement around provincial hate speech laws was no longer around the meaning of the sub-section two free speech 'rider', or whether legislative restrictions were constitutionally valid, but how narrowly or broadly provincial human rights restrictions on hate speech should be interpreted in light of s.2(b) of the *Charter*.[132] This represents a subtle but important shift in the impact of free speech sensitivity on the interpretation and application of hate speech statutes.

Finally, the Alberta Board of Inquiry's *Kane* decision was significant not only for bringing some focus to the central issues, but for the analytical framework which it adopted—in the wake of the Supreme Court of Canada's *Keegstra and Taylor* jurisprudence—for defining the scope of legislative restrictions on hate speech. The

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> "No one may publicly make or circulate hateful or contemptuous statements or commit hateful or contemptuous acts that incite discriminatory acts. Every person belonging to the target group may be considered to be a victim of a violation of this provision."
> (*Declaration*, *supra* note 131.)

The Quebec National Assembly did not act on this recommendation.

A 2003 review of the operation of the Quebec *Charter of Human Rights and Freedoms* recommended that "the *Charter* prohibit public incitement of discrimination" (*Commission des droits de la personne et des droits de la jeunesse du Quebec,* News Release/Communique, "The Commission des droits de la personne et des droits de la jeunesse proposes an update of the *Charter of Human Rights and Freedoms*" (20 November 2003)).

[132] *Supra* note 5.

Board laid to rest lingering doubts about the constitutional validity of the discriminatory signs and symbols model prohibition, but it simultaneously and, it might be said, paradoxically, endorsed the rigorous legal tests used by the Supreme Court of Canada for determining constitutional validity as the preferred mechanism for taking into account the need to respect free speech principles when adjudicating on the merits of individual complaints. It did so with some reluctance, "out of an abundance of caution," after expressly wondering whether it would be better to

> …simply say we have seriously considered the fact that any order we make will limit the freedom of expression of the respondents and that we feel the eradication of discrimination is more important than their right to display discriminatory signs and symbols.[133]

The Alberta Board of Inquiry's preference for the application of complex and legalistic tests drawn from the Supreme Court of Canada's constitutional validity jurisprudence over a relatively 'simple' exercise in balancing human rights did not disadvantage the complainants in *Kane*. However, as will be demonstrated below, this 'quasi-constitutional' approach to the interpretation and application of relevant provisions has been widely adopted in those jurisdictions which have enacted broader prohibitions on public communication that exposes identified groups to hatred, with a net narrowing effect on the scope and quality of the protection afforded to victims of hate speech.

4. PROVINCIAL LAWS DEALING WITH EXPOSURE TO HATRED OR CONTEMPT

Part 4 of this article is primarily concerned with examining the operation of provisions in provincial human rights statutes that prohibit not only discriminatory signs and symbols, but also a wide variety of methods of public communication of material that exposes identified groups to hatred or other forms of ill-feeling. However, attention will first be given to two Canadian provinces that have enacted 'statutory tort' mechanisms for allowing victims of racist speech to seek redress in the conventional civil justice system. In Manitoba (1934) this legislation pre-dated the growth of provincial human rights legislation and associated administrative enforcement mechanisms, whereas in British Columbia (1981) it was a direct

response to the limitations of the conventional discriminatory signs and symbols prohibition in provincial human rights legislation.

In both cases, the statutory torts model has proven to be of marginal significance as a legal device for combating hate speech, but a review of its modest history is worthwhile because it reveals many of the themes regarding the relationship between the right to free speech and legislative restrictions on hate speech. This relationship resonated in adjudications over prohibitions on discriminatory signs and symbols (discussed above in Part 3) and continues to resonate in adjudications over the broader prohibitions on public communication that promotes hatred, which will be examined in Part 4.2.

4.1 Statutory Torts[134]

Manitoba

In 1934 the Manitoba legislature amended[135] the *Libel Act* 1913 to create a cause of action for group libel as a response to racist hate speech. Like many pioneering hate speech statutes[136] this amendment was a direct response to the activities of a racist organisation, in this case the Brown Shirt Nationalist organisation, which was active in Winnipeg at the time.[137] The provision is now found in s.19 of the *Defamation Act* R.S.M.1987 c. D20:

> (1)The publication of a libel against a race, religious creed or sexual orientation likely to expose persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among people shall entitle a person belonging to the race, professing the religious creed, or having the sexual orientation to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.[138]

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133 *Kane supra* note 91 at D/298.

134 An earlier version of this discussion of statutory torts in Manitoba and British Columbia was published as part of McNamara, *supra* note 10 at 287-294.

135 *An Act to amend The Libel Act*, R.S.M. 1934, c 23, amending R.S.M. 1913, c. 113.

136 See, for example the discussion of the motivation for the creation of criminal offences of incitement to racial hatred in Western Australia in 1990: McNamara, supra note 10 at 222-225.

137 Melvin Fenson, "Group Defamation: Is the Cure Too Costly?" (1964-65) 1(3) Man. L. J. 255 at 259 [Fenson].

138 Sexual orientation was added in 2002: *The Charter Compliance Act,* R.S.M. 2002, c. 24, s.17.

The threshold established by the legislation is high. In addition to including a definition based on the common law definition of defamation (conduct likely to expose to hatred, contempt or ridicule) the definition also requires that the conduct must have the tendency to "raise unrest and disorder". The Manitoba *Defamation Act* does not provide for the payment of damages; the only remedy available is an injunction to restrain the defendant from continuing to engage in the conduct in question. In its 70 years of operation only two cases have ever been decided under the legislation.

Tobias v. Whittaker[139]

The first action was commenced on October 30th 1934, just six months after the amendments came into force on April 7th of that year. In *Tobias v. Whittaker* the plaintiff (W.V. Tobias) was a Winnipeg barrister and the defendant (William Whittaker) was the leader of the Brown Shirts and editor of *The Canadian Nationalist*. The plaintiff submitted that two articles published in *The Canadian Nationalist* on October 30th 1934, titled "The Murdering Jew, Jewish Ritual Murder" and "The Night of Murder…Secret of the Purim Festival" constituted racial defamation of Jews contrary to the legislation. An injunction was granted which restrained the defendant:

> …From continuing, writing, printing, or causing to be printed, circulating, distributing, or otherwise publishing the libel on the Jewish race and on those professing the Jewish creed, contained in the issue of *The Canadian Nationalist*, Volume 2, Number 6, or any similar libels injuriously affecting those belonging to the Jewish race or professing the Jewish creed.[140]

Henson, reflecting on *Tobias*, said: "in its first…test at bar, the Manitoba group defamation section proved effective."[141] However it was another 37 years before the legislation was invoked again.

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[139] *Tobias, supra* note 7.

[140] Record of unreported trial, quoted in Fenson, *supra* note 136 at 259. An interim injunction was issued on 4 November 1934, with a "perpetual injunction granted on 13 February 1935" (*ibid*).

[141] *Ibid.* at 260. See also Canada, Special Committee on Hate Propaganda in Canada, *Report,* (Ottawa: Queen's Printer, 1966) at 43.

Courchene v. Marlborough Hotel Co.[142]

In *Courchene v. Marlborough Hotel Co.* the plaintiff brought an action for racial defamation contrary to s.19 of the *Defamation Act* against a hotel, the manager of which had published a memo advising staff that "As we are having innumerable problems with the Indians and Metis coming into this hotel" they were to refuse accommodation to Indians and Metis customers.[143] The next day, when the President of the defendant company learned of the contents of the memo, it "was at once repudiated and suitable instructions given that it was to be ignored and that it was not hotel policy."[144]

In the Court of Queen's Bench, Tritschler C.J. ruled that the memo did not breach s.19 because it was not defamatory. Amongst the reasons relied upon by the judge were that the statement in the memo was "true and fair"—given that the hotel had been having the problems referred to in the memo[145]—and "[w]hat is true cannot be defamatory."[146] In addition the judge categorically rejected the plaintiff's submission that the memo carried an imputation that "Indians were 'unsanitary, unfit, undesirable, troublesome and unsuitable as guests of the hotel'".[147] The judge further held that the memo was covered by qualified privilege.[148]

The judge found for the defendant on the merits and also noted that even if the action had been successful, no injunction would have been "required or granted"[149] because the memo had been revoked and repudiated within hours of having been produced. Foreshadowing some of the concerns raised in the early discriminatory signs and symbols cases (see above, Part 3), Tritschler C.J. also raised doubts about the constitutional validity of the legislation:

> I am…of the opinion that the section is *ultra vires*, dealing as it does, with what is in essence criminal libel. Matters 'tending to raise unrest

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142 (1971), 20 D.L.R. (3d) 109 (Manitoba Court of Queen's Bench) [*Marlborough Hotel*].
143 *Ibid*. at 112..
144 *Ibid.* at 110.
145 *Ibid.* at 112.
146 *Ibid.*
147 *Ibid.*
148 *Ibid.* at 112-113.
149 *Ibid.* at 115.

> or disorder among the people' are for Parliament—which has occupied the field in the *Criminal Code*, s.267B.[150]

The plaintiffs appealed unsuccessfully to the Manitoba Court of Appeal.[151] However, in contrast to the trial judge's characterization of the memo, the Court of Appeal agreed with the plaintiff that the memo was "defamatory on its face".[152] Freedman C.J. specifically rejected the trial judge's characterization of the contents of the memo as truthful, stating, "[p]lainly there were many Indians coming to the Marlborough Hotel who presented no problem whatever and who behaved themselves properly. The defence of truth is not available, and the memorandum remains defamatory."[153] However, the Chief Justice of the Court of Appeal noted that "[t]he sole remedy under s.19 is an injunction" and in the circumstances (the memo having been quickly withdrawn) "there was nothing to restrain".[154]

Chief Justice Freedman criticized Tritschler C.J.Q.B.'s 'ruling' that s.19 was *ultra vires* and invalid, describing that part of the trial judgement as "obiter opinion"[155]. Chief Justice Freedman ruled that:

> …it was not open to the learned trial Judge to adjudge the section to be constitutionally invalid until after notice of that issue had been given to the Attorney General of Canada and the Attorney General of Manitoba….It is similarly not open to this Court to adjudge the section to be invalid. Since we are unable in this case to decide the constitutional question, we must proceed on the assumption that the legislation is valid until otherwise determined.[156]

A Dead Letter?

Cohen has advanced two primary reasons for what he describes as the "dead letter"[157] status of this particular form of legislative regulation of hate speech. The first reason, reflected in *Marlborough Hotel*, regarded the constitutional validity of the legislation.

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150 *Ibid.*

151 *Courchene v. Marlborough Hotel Co. Ltd.* [1972] 1 W.W.R. 149, (1971) 22 D.L.R. (3d) 157 (Manitoba Court of Appeal). [*Marlborough Hotel 2*, cited to W.W.R.].

152 *Ibid.* at 151.

153 *Ibid.* at 153.

154 *Ibid.*

155 *Ibid.* at 152.

156 *Ibid.*

Doubts as to its validity existed on the basis that under Canada's *Constitution Act* 1867, such legislation might be beyond the legislative competence of the provinces, either on the basis that the legislation effectively *criminalized* racial defamation, a form of regulation within the ambit of the federal jurisdiction,[158] or because it regulated freedom of speech, which was also considered to be the exclusive preserve of the federal Parliament. In 1964, in a report prepared for the National Joint Community Relations Committee in Toronto, Arthur Maloney expressed the opinion that the legislation was unconstitutional:

> …since freedom of speech and freedom of press is involved, legislative jurisdiction upon such classes of subjects belongs to the Parliament of Canada under the peace, order and good government clause and under the criminal sub-section in the British North America Act, and that a provincial legislature has no power to legislate in relation to such classes of subjects.[159]

However, as noted above (Part 3), the view that provincial attempts to regulate free speech are invalid because freedom of speech is exclusively a federal matter no longer finds support.[160]

The second reason identified by Cohen to explain the very infrequent use of this particular regulatory option is that the only remedy for racial defamation under the statute is an injunction, and victims of racial defamation may feel that there is insufficient personal benefit in commencing an action:

> Another factor might be that a plaintiff, suing as a member of a defamed group, wants more than the cessation of the material which is libellous. He wants monetary damages for the hurt he suffered because of the libel. However, to date, the courts have been unwilling to give such a plaintiff monetary damages because of a theory which has been elevated to an unspoken presumption which presumes that when groups are the victims of libellous actions, individuals within the group cannot be hurt simply because he is a member of the defamed group. Needless to say this presumption has been rebutted by scientific psychological experimentation. However, because the courts have not yet seen the light, it is not worth anyone's while or expense to sue.[161]

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[157] Stephen Cohen, "Hate Propaganda: The Amendments to the Criminal Code" (1971) 17(4) McGill L. J. 740 at 750-751 [Cohen].

[158] *Constitution Act,* 1867 *supra* note 80 s. 91(27).

[159] Quoted in Fenson, *supra* note 137 at 260. See also *The Daily Gleaner supra* note 35.

[160] See, e.g., *Bramhill supra* note 70; *Taylor supra* note 4; also Walter Tarnopolsky and William. Pentney, *Discrimination and the Law,* revised ed. (Toronto: Carswell, revised ed., 1994) at para 10-11ff [Tarnopolsky & Pentney].

[161] Cohen, *supra* note 157 at 750-751; see also Errol Mendes (ed), *Racial Discrimination Law and Practice* (Toronto: Carswell, 1997) para. 4-44.

Notwithstanding the merit in the content of Cohen's argument, its direction at the courts seems misplaced, at least in relation to the statutory cause of action for group racial defamation—it is the legislature that has unequivocally chosen to limit the remedy to an injunction with no facility for the award of damages.

While the limited remedial options may have been an impediment to the utilisation of s.19 of the *Defamation Act*, it is unlikely that this is the only reason why only two cases have ever been decided under s.19. The narrow statutory definition of group defamation (including the dual proof requirements that the publication must be both likely to expose members of the target group to hatred, *and* tend to raise "unrest or disorder"), as well as financial and other barriers to the commencement of formal civil proceedings can be assumed to also have had an influence.

British Columbia

In response to the demonstrated inadequacy of the discriminatory signs and symbols prohibition model, following the controversy over the KKK and the subsequent McAlpine Report (see above, Part 3), in 1981 the British Columbia provincial legislature enacted the *Civil Rights Protection Act*.[162] Section 2 of the *Act* provides:

> A 'prohibited act' is a tort actionable without proof of damage,
>
> (a) by any person against whom the prohibited act was directed, or
>
> (b) where the prohibited act was directed against a class of persons, by any member of that class.

A "prohibited act" is defined in s.1 of the *Act*:

> In this Act, 'prohibited act' means any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting
>
> (a) hatred or contempt of a person or class of persons, or
>
> (b) the superiority or inferiority of a person or class of persons in comparison with another or others
>
> on the basis of colour, race, religion, ethnic origin or place of origin.

[162] R.S.B.C. 1981, c. 12.

Damage is not an element of the tort created by the *Civil Rights Protection Act*. In addition, the tort created by s.2 of the *Act* is not limited to public acts—it covers "any conduct or communication". The range of remedial options is relatively wide, including damages, exemplary damages and injunctive relief.[163]

Where a tort action is commenced under s.2, the plaintiff is obliged to notify the Attorney General within 30 days.[164] Under s.3 of the *Act* the Attorney General may intervene[165] and become a party to the proceedings.[166]

The definition of the tort created by s.2 of the *Civil Rights Protection Act* is limited to conduct which is done for the "purpose" of bringing about one of the proscribed consequences. The use of this phrase to express the fault element of the tort indicates that the fault component is subjective, requiring proof that the defendant *intended* to bring about the relevant consequence or knew that the conduct would probably have this effect. In addition to establishing that the conduct defined by s.1(1) is a tort, the *Act* also provides (s.5) that the conduct so defined constitutes a criminal offence punishable by a $2000 fine or 6 months imprisonment (or a $10,000 fine in the case of a corporation or society). In this way, it adopts a 'hybrid' approach to the regulation of hate speech, relying on both civil (tort) and criminal approaches.

In his second reading speech on the Civil Rights Protection Bill the Attorney General of British Columbia at the time, Mr. Williams, explained that the legislation was designed to respond to racist activity by providing "a means of access to our courts, a means of remedy which is currently absent in our law."[167] The legislation was unanimously supported in the Legislative Assembly. Records of the debate during the second reading reveal no mention of concern that the legislation would adversely affect free speech.[168] The contrast on this issue, between the response to the *Civil Rights Protection Act* and the response to the 1993 amendments to the *Human Rights Act* 1984 (see below, Part 4.2.3) are striking.

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163 *Ibid.* at s. 4.
164 *Ibid.* at s. 3(3).
165 *Ibid.* at s. 3(1).
166 *Ibid.* at s. 3(2).
167 British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)* (29 June 1981) at 6475.
168 *Ibid.* at 6474-6477.

Only one case has been decided under the *Civil Rights Protection Act* 1981. In *Brochu v. Nelson and British Columbia Hydro and Power Authority*[169] the plaintiff claimed that his employer and immediate supervisor had breached s.2 of the *Act*. The plaintiff cited the supervisor's alleged conduct and communication with the plaintiff (specifically, the supervisor's allocation of more lucrative tasks to other employees) as having the purpose of interfering with his civil rights by "promoting the superiority of others over him, or promoting his inferiority in comparison with others on the basis of his ethnic origin which is French-Canadian, or place of origin, which is Quebec."[170] Evidence was presented that Nelson had made disparaging remarks about French-Canadians referring to them as 'frogs' and expressing displeasure that a number of French-Canadians from Quebec had come to British Columbia to work. McKenzie J. for the British Columbia Supreme Court doubted the plaintiff's evidence and was persuaded by the denial of his supervisor, ruling that "[t]he plaintiff's case fails at the threshold because he has not proven on a balance of probabilities that the supervisor committed any prohibited act".[171] The action was dismissed with costs.

Mirroring Manitoba's experience with s.19 of the *Defamation Act* 1987, it appears that one of the factors contributing to the minimal use of the *Civil Rights Protection Act* has been concern about its constitutional validity. At the time of its enactment the legislation was unanimously supported in the British Columbia Legislative Assembly. Records of the debate on second reading reveal no mention of concern that the legislation would adversely affect free speech.[172]

However, in 1993, during debate on a bill to add a hate speech ground of complaint to the British Columbia *Human Rights Act* 1969[173] (see below, Part 4.2.3), Government (New Democratic Party) MLA Mr. Dosanjh observed that although the *Civil Rights Protection Act* had never been subject to a constitutional challenge it was "wide open to challenge under the *Charter*" on the basis of an infringement of the right to freedom of expression.[174] In particular Mr. Dosanjh suggested that the *Civil Rights Protection Act* was actually too broad in its regulatory scope because it covered

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169 [1986] BCJ No 998 (BCSC) (QL) [*Brochu*].
170 *Ibid.* at para. 2.
171 *Ibid.* at para. 14.
172 *British Columbia Hansard, supra* note 163.
173 R.S.B.C. 1969, c. 10.
174 British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)* 11 (1) (10 June 1993), at 7061.

both public and private communications.[175] Mr. Dosanjh continued (presumably unaware of the decision in *Brochu*):

> I don't remember the Civil Rights Protection Act being used in the last 12 years in British Columbia, because in the form it was brought to this House it was unusable. It was a laudable piece of legislation, but unusable. It was impractical because it criminalized the process, which meant you had a higher onus of proof. In the civil aspect of it, it also took the matter into the jurisdiction of the Supreme Court rather than the lower courts, which are much simpler for people to deal with.[176]

Although the *Civil Rights Protection Act* has not been repealed, in 1993 it was effectively replaced[177] as the preferred legislative regime for the regulation of hate speech by s.7 of the British Columbia *Human Rights Code* (see below, Part 4.2.3).

4.2 Provincial Human Rights Law Provisions

Legislatures in five Canadian jurisdictions have broadened the conventional prohibition on discriminatory signs and symbols into a prohibition on a relatively wide range of hate speech types. On their face, the laws which currently operate in British Columbia, Alberta, Saskatchewan, and the Northwest Territories, and the law which operated in Manitoba between and 1976 and 1987, appear to offer broader protection to victims of hate speech, by generally covering a wider range of public communication methods, and by prohibiting conduct which is likely to have any one of a number of negative consequences—from discrimination, to hatred and contempt, and, in the case of Saskatchewan, ridicule, belittlement, or an affront to dignity.

It is not surprising then, that in the 10 decisions which have been handed down by provincial boards, panels, tribunals and courts over the course of more than two decades,[178] this model of provincial hate speech law has generally been regarded as representing an even greater threat to the right to free speech than the traditional discriminatory signs and symbols prohibition. As will be demonstrated in the following discussion, while the issue of constitutional validity has been addressed on a number of occasions, the most significant way in which free speech sensitivity has

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[175] *Ibid*. at 7062.
[176] *Ibid.*
[177] The Deputy Premier and Minister Responsible for Multiculturalism and Human Rights explained during the second reading speech on the Human Rights Amendment Bill that the new ground of complaint would "replace" the *Civil Rights Protection Act* 1981: *supra* note 174 at 7057.
[178] As at 31 March 2004.

manifested in public adjudications is as a motivation for the adoption of restrictive tests for determining the scope and application of the prohibition in a given instance. The net result has been that notwithstanding the decision of the legislatures to broaden the scope of the prohibition, thereby improving the protection afforded to targets of hate speech, in practice, the threshold that must be satisfied in order to establish a breach of the legislation remains high.

4.2.1 Manitoba

Following its enactment of Canada's first 'hate speech' statute in 1934, Manitoba achieved another first in 1976 when it became the first province in Canada to prohibit not only conduct which indicated discrimination or an intention to discriminate, but in addition, conduct which *incited hatred*. Following the enactment of the *Human Rights Amendment Act* 1976[179], s.2 of the *Human Rights Act* 1974[180], provided that:

> (1) No person shall
>
> (a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
>
> (b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;
>
> any notice, sign, symbol, emblem or other representation
>
> (c) indicating discrimination or intention to discriminate against a person; or
>
> (d) exposing or tending to expose a person to hatred;

[179] R.S.M. 1976, c. 48.
[180] R.S.M. 1974, c. 65.

> because of the race, nationality, religion, colour, sex, marital status, age, source of income, family status, ethnic or national origin of that person.

At the second reading of the bill in the Manitoba legislature, the Attorney General at the time, Howard Pawley, explained the rationale for the addition to s.2 of the words "exposing or tending to expose persons to hatred":

> This is a result of legal opinion in respect to the weakness of the present provisions insofar as enforcement is concerned. It would be very difficult to ever obtain a conviction under this section. It ties in closely with the old Manitoba Defamation Act which was passed back in 1934 in connection with class actions pertaining to libel against groups of people as a result of race, religious creed, etc.[181]

Surprisingly, and in stark contrast to the heated debate surrounding the expansion of the hate speech provisions of British Columbia's human rights legislation in 1993 (see below, Part 4.2.3), the amendment of s.2 of Manitoba's *Human Rights Act* in 1976 attracted no adverse comment or criticism during the legislative debate on the bill. Opposition criticism of the bill tended to focus on other matters, including concerns about the scope of Manitoba Human Rights Commission and Board of Inquiry powers.[182]

The Attorney General's statements that s.2 was amended in 1976 so as to make it easier to enforce is curious. Certainly, in one important sense the amended legislation was broader in scope than its predecessor: it prohibited certain conduct that *either* indicated discrimination *or* promoted hatred. Therefore, the change widened the range of *consequences* that would bring conduct within the prohibition. This was an important development. As demonstrated in Part 3 of the article, so long as the prohibition applied only to representations which indicated discrimination (or an intention to discriminate) the coverage of provincial human rights legislation with respect to hate speech would remain very limited indeed.

However, the amendments made no change to another very substantial constraint on the scope of s.2—the mode of representation. Even after the 1976 amendments only a narrow range of communication forms was covered by the legislation: the display of notices, signs, symbols, or emblems or other representations.

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[181] Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)* (7 May 1976) at 3454.

[182] See, e.g., Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)* (21 May, 1976) at 4130-4131 (Mr. Axworthy); and Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)* (28 May 1976) at -4379 (Mr. Spivak).

If, in drafting the 1976 amendments, the Manitoba legislature's objective had been to give s.2 'more teeth', it is surprising that the section was not re-worded to apply to a wider range of forms of representation or communication. It is likely that this constraint had been just as significant as the limitation to *discriminatory* representations in making it "very difficult" to prove a breach of s.2. Perhaps it was considered that the inclusion of the collective term "other representations" at the end of the list of prohibited forms of representation made the section sufficiently broad to catch discriminatory or vilifying expressions, however represented. Unfortunately, the Manitoba courts did not share this view.

Winnipeg Sun[183]

In 1983 two Aboriginal men, Kenneth Linklater and Chief Louis Stevenson of the Peguis Indian Band, lodged a complaint with the Manitoba Human Rights Commission alleging that two articles written by Peter Warren and published in *The Winnipeg Sun* newspaper breached s.2(1) of the *Human Rights Act* 1974. The complainants claimed that Warren had stereotyped an Aboriginal person to be "a drunk, a wastrel, an idlemonger, a person who is only too happy to live on a government cheque, an in-breeder, a parasite, a non-contributor...".[184] A Board of Adjudication was appointed to hear and decide the matter. However, the merits of the complaint—that is, whether the articles in question amounted to hate speech—were never addressed. A preliminary objection to the complaint was raised by the respondents who argued that newspaper articles did not come within the definition of "notice, sign, symbol, emblem or other representation" and therefore were not covered by s.2(1) of the *Human Rights Act* irrespective of their content.

The Board of Adjudication rejected the respondents' argument, stating that

> It is clear that in Section 2(1) the legislature considered publishing in newspapers. I am satisfied that the phrase 'other representation' includes journalistic or editorial comment.… The stated purpose of the Section is to prevent discrimination against person(s) or the exposure of any person(s) to hatred because of the criteria mentioned therein.[185]

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[183] *Linklater v. The Winnipeg Sun* (1984), 5 C.H.H.R. D/2098 (Man. Bd. Adj.) [*Winnipeg Sun*].
[184] Complaint filed by Chief Louis Stevenson, 31 March, 1984, *ibid.* at 2099.
[185] *Ibid.* at 2102.

The Board of Adjudication also rejected the respondents' argument that s.2(2) "permitted unrestricted editorial or journalistic comment":[186]

> It would appear unrealistic that on the one hand the legislature would enact enlightened legislation whose object was to lessen discrimination of all types and on the other hand would concurrently enact in the same statute legislation which would permit absolutely any type of discriminatory remark or comment and excuse same under the guise of freedom of expression.[187]

Warren applied to the Manitoba Court of Queen's Bench for an order of prohibition to prevent the Board of Adjudication from continuing its inquiry. Morse J. ruled that the newspaper articles written by Warren did not constitute "any notice, sign, symbol, emblem or other representation" for the purpose of s.2(1). Therefore, the Board of Adjudication had no jurisdiction to deal with the complaints.[188] Morse J. rejected a submission made by the Manitoba Human Rights Commission that the *Human Rights Act* "should be...given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects..." and that "[t]he objects of the *Act*...would not be attained unless all discrimination in newspaper journalism was covered by s.2(1)." Morse J. stated that:

> I am of the view that the Legislature did not intend to cover all forms or manner of discriminatory expression. If this had been intended, the Legislature could very easily have said so. The specific words chosen demonstrate, in my opinion, an intention to be selective.[189]

The records of parliamentary debates at the time of the 1976 amendments do not provide any indication as to whether the Manitoba legislature made a conscious decision to limit the prohibition to particular modes of communication. However, it is possible. Yet, it seems equally plausible that the legislature simply retained the "signs and symbols" formulation that had long been standard in provincial human rights legislation, without realising that the retention of this limitation was contrary to the general tenor of the 1976 reforms—to broaden the scope of the prohibition on the promotion of hatred.

In any event, an appeal by the Manitoba Human Rights Commission to the Manitoba Court of Appeal against the order made by Morse J. was unsuccessful. The

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[186] *Ibid.*

[187] *Ibid.* at 2103.

[188] *Warren and Chapman,* [1984] 5 W.W.R. 454, (1984) 11 D.L.R. (4th) 474 at 479 (Man QB) [*Winnipeg Sun 2,* cited to D.L.R.].

Court held that Morse J. had been incorrect in concluding that a newspaper article was not a representation for the purpose of s.2(1).[190]

Repeal of the "Exposure to Hatred" Prohibition

Manitoba's experiments with prohibitions on hate speech in human rights legislation took another twist in 1987 as part of an overhaul of Manitoba's human rights legislation. The Manitoba *Human Rights Act* 1974 was repealed and replaced by the *Human Rights Code* R.S.M. 1987 c. H175. The provision dealing with exposure to hatred and contempt was repealed and Manitoba reverted to a narrower prohibition on discriminatory communications.

Section 18 of the Human Rights Code now provides that:

> No person shall publish, broadcast, circulate or publicly display, or cause to be published, broadcast, circulated or publicly displayed, any sign, symbol, notice or statement that
>
> (a) discriminates or indicates intention to discriminate in respect of an activity or undertaking to which this Code applies; or
>
> (b) incites, advocates or counsels discrimination in respect of an activity or undertaking to which this Code applies;
>
> unless bona fide and reasonable cause exists for the discrimination.

This provision simultaneously expands and contracts the scope of s.2 of the 1974 *Human Rights Act*, as amended in 1976. On the issue of the mode of communication, s.18 expressly applies to *statements* as well as notices, signs and symbols. This change amounts to a legislative reversal of the decision of the Manitoba Court of Appeal *in Re Warren and Chapman*[191] and represents a (potentially) substantial expansion of the scope of the prohibition. However, with respect to the range of *consequences* covered by the prohibition, s.18 represents a retreat back from the incitement or promotion of hatred, to discrimination.

In his second reading speech on the 1987 amendments, Attorney General Roland Penner, offered the following explanation for the changes to the hate speech provisions in Manitoba's human rights legislation:

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189 *Ibid.* at 479.

190 *Warren and Chapman,* [1985] 4 W.W.R. 75, (1985) 17 D.L.R. (4th) 261 (Man CA) [*Winnipeg Sun 3*].

> First of all, of course, you will recall that in the Peter Warren case, the courts found against the Human Rights Commission in that particular prosecution, but there are concerns that go beyond that, where particularly because of the guarantee of freedom of speech in the *Charter*, it is said that one ought not to use the force of law to prohibit even extreme forms of speech. So you have within the civil rights, human rights constituency itself some concerns about how to use the law, if at all, in that area. I must say understand and I share those concerns.
>
> So what we've attempted to do in the rewriting of that section is to make it very, very specific, and that it's only if the statement or sign or notice discriminates or indicates discrimination that it comes within the purview of the act. So it's clear that the simple expression of ideas itself is not intended to be covered by this act and we hope, expect, that the section as written will not conflict with section 2 of the *Charter*.[192]

The Manitoba Attorney General's comments give a strong illustration of the way in which free speech sensitivity, amplified by the Supreme Court of Canada's *Charter* jurisprudence, which was just emerging during the 1980s, has impacted on the scope of provincial human rights laws dealing with hate speech. However, there are two things that are distinctive about the Manitoba experience. First, for the most part, the tendency towards the narrow construction of hate speech restrictions has generally occurred in judicial or quasi-judicial settings, whereas in the case of Manitoba's 1987 amendments, the narrowing was effected by the legislature. Second, Attorney General Penner's comments suggest that the amendment was an attempt to 'pre-empt' scrutiny of the constitutional validity of Manitoba's hate speech laws, or to immunize them from challenge. Ironically, if the prohibition which operated in Manitoba between 1976 and 1987 was assessed in accordance with the principles and rules laid down by the Supreme Court just a few years later,[193] it is clear that the broader prohibition would still have passed constitutional muster, as has established by subsequent court and tribunal decisions in other provinces.

The Manitoba example highlights the wide variety of views regarding the legitimacy of legislative restrictions on hate speech, and the degree to which authoritative statements of these different views are prone to fluctuate over time. In 1987 the Manitoba legislature decided to readjust the legal boundary between

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[191] *Ibid.*

[192] Manitoba, Legislative Assembly, *Debates and Proceedings* (*Hansard*), Volume XLVII NO. 54 (3 June 1987) at 2718.

[193] *R. v. Keegstra*, *supra* note 3;*Taylor v. Canadian Human Rights Commission*, *supra* note 4.

protected free speech and unlawful hate speech at the macro-level of legislative amendment. Since this time, a process of negotiation and re-negotiation has continued to take place in those other provinces where the broader model of hate speech laws has been in operation. Although this boundary negotiation has mainly taken place at the micro-level of case-by-case judicial and quasi-judicial interpretation and adjudication, it has nonetheless been an important part of the ongoing task of resolving the tension between competing human rights.

4.2.2 Saskatchewan

In 1979, as part of a consolidation and overhaul of human rights laws, Saskatchewan replaced its narrow "discriminatory signs and symbols" provision with a broader restriction on the promotion of ill-feeling against identified groups. Section 14 of the *Saskatchewan Human Rights Code* 1979 provided:

> No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, *or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity* of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.[194]

The specific motivation for the broadening of Saskatchewan's prohibition on discriminatory signs and symbols is unclear. It is possible that it was modelled on the provisions which had been enacted in Manitoba just a few years earlier, but the records of parliamentary debates on the 1979 *Saskatchewan Human Rights Code* do not provide any guidance as to what prompted the expansion of the legislation prohibition. In the second reading speech in the Legislative Assembly, Attorney General Roy Romanow made no mention of the broadened hate speech provision. The main focus

[194] Saskatchewan *Human Rights Code*, R.S.S. 1979, c. S-24.1, s. 14 [Emphasis added].

of the speech was on the extension of the grounds[195] of unlawful discrimination under the *Code*.[196]

In terms of the harmful consequences to which it applied, the 1979 changes made s.14(1) of the *Saskatchewan Human Rights Code* the broadest of the Canadian provincial hate speech laws—that is, it included not only hatred and contempt, but also ridicule, belittlement, and affront to dignity. However, in one key respect, the types of communication covered by the prohibition, the legislation retained the narrowness of most equivalent Canadian statutes. Section 14(1) applied to communication in the form of a "notice, sign, symbol, emblem or other representation". The limiting effect of this form of words on the scope of the legislation was confirmed in the first high-profile matter under s.14 to come before the Saskatchewan Human Rights Commission and the Saskatchewan courts, and led to further amendments in 1989 (see below). However, in the first case to be decided under the expanded s.14, the mode of communication fell squarely within the ambit of the prohibition.

McKinlay v. Cranfield and Dial Agencies[197]

In 1980 Penny McKinlay lodged a complaint with the Saskatchewan Human Rights Commission alleging that a letter which she had seen displayed in the window of a Saskatoon rental accommodation agency, Dial Agencies, breached s.14. The letter had been placed there by Cranfield, General Manager of Dial Agencies. It was an open letter to the Premier of Saskatchewan expressing dissatisfaction with the Department of Social Services with whom Cranfield had recently dealt in the context of a dispute with a tenant. After describing what he regarded as poor service by an employee of the Department, the letter included the following:

> After talking to this person I would highly recommend the government of this province hire the handicapped; the situation

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[195] The 1979 Code added the grounds of marital status, age and physical disability.

[196] Saskatchewan, Legislative Assembly, *Hansard* (23 April 1979) at 1951-1952. THIS YEAR IS NOT AVAILABEL AT THE LEGISLATIVE ASSEMBLY WEBSITE. please USE YOUR SOURCE TO ENSURE THAT YOU HAVE THE CORRECT TITLE (JUST STATINGF HANSARD IS NOT SUFFICENT ACCORDING TO McGill) AS WELL AS VOLUME OR ISSUE NUMBER. PLEASE ALSO ENSURE THAT ANY RELATED QUOTES ARE CORRECT. **SORRY – I ONLY HAVE HAND WRITTEN NOTE – VOLUME NUMBER NOT RECORDED**

[197] (1980) 1 C..H.R.R. D/246 (Sask. Bd. Inq.) [*McKinlay*].

> could only improve if they hired mentally retarded too. Or is this being done already?[198]

The complainant, who suffered from epilepsy, argued that the letter/notice "equated physical disability with incompetency," and tended to perpetuate the stereotype "that the physically handicapped cannot do a good job."[199] The Saskatchewan Board of Inquiry found that a reasonable person would regard the letter as ridiculing, belittling or affronting the dignity of persons with a physical disability. It was irrelevant that Cranfield did not intend his letter to have this effect. The Board held that the respondents had contravened s.14 of the *Saskatchewan Human Rights Code*, and ordered that the offending sentences be deleted from any copy of the letter displayed or published by the respondents in the future.

Saskatchewan Human Rights Commission v. Waldo et al and The Engineering Students' Society, University of Saskatchewan[200]

In 1981 Kathleen Storrie, an Assistant Professor of Sociology at the University of Saskatchewan, lodged a complaint with the Saskatchewan Human Rights Commission alleging that material contained in two issues of the *Red Eye* newspaper published by the Engineering Students' Society at the University breached s.14 by ridiculing, belittling and affronting the dignity of women.[201]

In 1984 a Board of Inquiry upheld the complaint.[202] After reviewing the contents of the student newspaper issues in question, the Board observed:

> The manner in which women were 'belittled' and had their dignity affronted because of their sex involved material suggesting that women in educational institutions are less than human; that they are inferior beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women are belittled by being represented as mere objects, their dignity or quality of being worthy is depreciated. The material further affronts the dignity of women by trivializing and deriving humour from material which promotes sexual violence and the objectification of women. The material

198 *Ibid* at D/246.

199 *Ibid.* at D/247.

200 (1984) 5 C.H.R.R. D/2074 [*Red Eye*].

201 See generally, Wanda Wiegers, "Feminist Protest and the Regulation of Misogynist Speech: A Case Study of *Saskatchewan Human Rights Commission v Engineering Students' Society*" (1992) 24 Ottawa L. Rev. 363.

202 *Supra* note 200.

> repeatedly represents women, in general, as less than human. In places the newspapers promote violence and demeaning treatment of women because of their sex.[203]

In response to the respondents' contention that a finding that the *Red Eye* publications violated s.14(1) would constitute "improper censorship" and would be "totally contrary to the basic rights of freedom of expression",[204] the Board of Inquiry undertook a comprehensive analysis of the relationship between freedom of expression and legislative restrictions on hate speech of the type contained in s.14(1). The Board acknowledged that human rights laws like the *Saskatchewan Human Rights Code* do involve the "difficult task of reconciling two competing social interests".[205] It concluded that this reconciliation may be legitimately "accomplished through restrictions on the scope of the freedom of expression by legislative and judicial means", and observed that "[t]he phrase '*under the law*' in Section 14(2) clearly acknowledges this type of restriction in the *Code*".[206]

The Board declared that material contained in the two issues of the *Red Eye* did breach s.14(1) and was "not protected by the freedom of expression".[207] It ordered that there be no further dissemination of the two issues in question, that the Engineering Students' Society distribute copies of the Board's findings along with the next issue of the *Red Eye*, and that the staff of the *Red Eye* and the executive of the ESS attend Saskatchewan Human Rights Commission workshops.

One of the respondents, David Hoffer, appealed to the Saskatchewan Court of Queen's Bench.[208] The main grounds of appeal were that:

> i) the prohibition in s.14(1) on exposure to hatred, ridicule, belittling or affront to dignity was invalid by virtue of inconsistency with the right to freedom of expression in s.2(b) of the *Charter*;
>
> ii) the prohibition in s.14(1) on exposure to hatred, ridicule, belittling or affront to dignity was a criminal law and therefore beyond the power of a provincial legislature;

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[203] *Ibid.* at D/2088.
[204] *Ibid.* at D/2080.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.* at D/2094.

> iii) the Board of Inquiry failed to consider whether the newspaper material which was the subject of the complaint fell within the definition of "any notice, sign, symbol, emblem or other representation".

Milliken J. declined to consider the first ground because the two issues of the *Red Eye* in question were published before the *Charter* came into force.[209]

The second ground was reminiscent of one of the concerns raised by the Manitoba Court of Queen's Bench in 1971[210], but one might have expected that more than a decade later the jurisprudence regarding the distribution of law-making capacity under Canadian federalism would have been sufficiently settled for judges to give such arguments short shrift. On the contrary, Milliken J. held, in effect, that the 1979 amendments to Saskatchewan's human rights legislation—that is, the prohibition of conduct which exposed an individual or group to hatred, ridicule, belittling or affront to dignity—if interpreted and applied without requiring evidence of an enhanced risk of discrimination against the target group, was *ultra vires* because this would place the laws in conflict with the criminal offences covering hate propaganda which the Canadian Parliament had already created. According to Milliken J. the provincial law-making authority was limited to the prohibition of conduct that was likely to promote discrimination.[211] Even more surprisingly, on further appeal the Saskatchewan Court of Appeal effectively endorsed this narrow construction of s.14(1), although it rejected the *ultra vires* characterization (see below).

Justice Milliken also upheld the appellant's argument that the Board had failed to limit its examination to those modes of communication that were covered by the phrase "any notice, sign, symbol, emblem or other representation". Justice Milliken quoted extensively from, and applied the reasoning of, Morse J. in *Winnipeg Sun 2*[212] in concluding that the Board had inappropriately treated articles in the *Red Eye* as falling within the s.14 prohibition.

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[208] *Hoffer v. Havemann* (1986), 7 C.H.R.R. D/3443 (Saskatchewan QB) [*Red Eye 2*].
[209] *Ibid.* at D/3451.
[210] See *Marlborough Hotel*, *supra* note 142.
[211] Milliken J. was heavily influenced by the academic commentary of Tarnopolsky, supra note 23 at 337-338.
[212] *Winnipeg Sun 2, supra* note 188.

The Court of Queen's Bench allowed the appeal and quashed the Board of Inquiry's decision and orders. An appeal by the Saskatchewan Human Rights Commission to the Saskatchewan Court of Appeal on questions of law was unsuccessful.[213] By majority,[214] the Court largely confirmed the correctness of Justice Milliken J.'s analysis and findings.

On the question of the modes of communication covered by s.14, Cameron J.A. of the Court of Appeal concluded that the wording of s.14(1) made it clear that the prohibition did not apply to statements generally, but only to particular forms of communication. In reaching this conclusion, Cameron J.A. observed:

> The provision simply does not have that kind of sweep. If it had, it would gather in statements in newspapers, magazines, books, movies, songs, plays, performances, dissertations, and the like. In other words, whatever the medium and whatever their form, messages reinforcing prejudice and fostering discrimination would be prohibited, subject only to the right to free speech.…
>
> It is not for us to say why the legislature chose to limit the scope of the section, but limit it it did, and we respect that. And that raises the central dilemma of this case. The purpose of the Act pulls in one direction, the cast of the section in another.[215]

On the other major issue raised by the *Red Eye* litigation, Cameron J.A. confirmed that in order to protect it from constitutional invalidity as *ultra vires* the province, s.14(1) had to be read as requiring not merely that the message in question ridiculed, belittled or affronted the dignity of the person or class, but *in addition* it must be "such as to cause or be likely to cause others to engage in one or more of the discriminatory practices prohibited" by the *Code*.[216] The somewhat perverse effect of this decision was that it largely nullified the effect of the 1979 widening of the consequences component of the prohibition, by reading down the phrase "exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity" so as to require evidence of discriminatory effect—a harm which was already largely

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[213] Saskatchewan (*Human Rights Commission) v. Engineering Students' Society* (1989), 56 D.L.R. (4th) 604, 72 Sask. RT. 161 (Sask CA) [*Red Eye 3,* cited to D.L.R.].

[214] Cameron and Wakeling J.J.A.; Vancise J.A. dissenting.

[215] *Supra* note 213 at 623. In his dissent, at 657, Vancise J.A. approved a broad interpretation of "other representation" so as to include newspaper articles on the basis that human rights legislation, as "special" legislation, should be interpreted generously, and that to fail to do so would risk impairing or defeating the "broad social purposes of the Code".

[216] *Ibid.* at 621.

covered under the traditional 'Ontario model' prohibition.[217] The correctness of this approach is even more questionable when it is recognised that it is underpinned by an unjustified conflation of laws affecting free speech with federal criminal law jurisdiction under s.91(27) of the *Constitution Act 1867*, and an unexplained confinement of provincial jurisdiction in the area of "Civil Rights" under s.92(13) of the *Constitution Act 1867* to anti-discrimination laws.[218]

Nonetheless, the majority's restrictive interpretation in *Red Eye 3* has become entrenched as the authoritative interpretation of the scope of s.14(1), as the next decision to come before the Saskatchewan courts confirmed. This decision, therefore, represents yet another example of the way in which free speech sensitivity has served to narrow the scope of provincial human rights laws dealing with hate speech, albeit in a different form than it has operated in other (more recent) cases. That is, it operated in conjunction with a particular view of the distribution of law-making authority between the Canadian Parliament and the provincial legislatures.

On the other side of the ledger, the *Red Eye* litigation highlighted the modes of communication limitation in s.14(1) and brought it to the attention of the Saskatchewan legislature, which promptly amended the legislation in 1989 to cover all forms of communication. Section 14(1) now applies to "…any representation, including, without restricting the generality of the foregoing, any notice, sign, symbol, emblem, article, statement or other representation".[219]

Constitutional Validity and Narrow Construction Confirmed: Saskatchewan Human Rights Commission v. Bell[220]

The question of constitutional validity was again raised for consideration in *Saskatchewan Human Rights Commission v. Bell*, albeit in a different form than had been addressed in the *Red Eye* litigation. The 1994 decision of the Saskatchewan

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[217] So much for the principle of respecting the wishes of the legislature—which had been earlier raised by Cameron J.A. in confirming the narrow reach of the legislation in terms of modes of communication– see above, note 215.

[218] In dissent, Vancise J.A. (*supra* note 215 at 650-651) held that there was no operational conflict between the hate propaganda provisions contained in the Canadian *Criminal Code* and s.14 of the *Saskatchewan Human Rights Code* 1979.

[219] R.S.S. 1989-90, c. 23, s.9.

[220] (1992), 88 D.L.R. (4th) 71, [1992] 2 W.W.R. 1 (Sask. QB) [*Bell* cited to D.L.R.]; (1994), 114 D.L.R. (4th) 370, [1994] W.W.R. 458 (Sask. CA) [*Bell 2* cited to D.L.R.].

Court of Appeal was the first (and to date, only) occasion where a provincial appellate court had been called upon to adjudicate directly on the relationship between a provincial hate speech prohibition and the right to freedom of expression contained in s.2(b) of the *Charter*. After becoming aware that Eugene Bell, the proprietor of the "Chop Shop Motorcycle Parts" business in Saskatoon was selling three stickers which depicted the faces of "persons of black, oriental and East Indian origin…[with] a red circle surrounding the face and a red stroke through the face,"[221] the Saskatchewan Human Rights Commission made an application in the Saskatchewan Court of Queen's Bench for an injunction to restrain Bell from selling or displaying the stickers on the basis that to do so was a contravention of s.14 of the amended *Saskatchewan Human Rights Code*. Hunter J. ruled that the Commission did not have standing to seek an injunction, but recognised that another plaintiff added during the course of the proceedings, Manohar Sing Ahluwalia, President of the Sikh Society of Saskatoon, did have standing.[222] The main issue addressed by the Court of Queen's Bench was the constitutional validity of s.14. In the wake of the Supreme Court of Canada's decisions in *Keegstra*,[223] and *Taylor*,[224] the Saskatchewan Human Rights Commission conceded that s.14 did infringe the right to freedom of expression and so the specific issue before the Court was whether this infringement could be justified in accordance with s.1 of the *Charter*.[225] Much of Hunter J.'s judgement is devoted to a discussion and application of the tests for constitutional validity laid down by the Supreme Court of Canada in *Oakes*,[226] as employed in the hate speech cases of *Keegstra* and *Taylor*. In determining whether s.14 represented a legitimate infringement of the right to freedom of expression, Hunter J. focused on the prohibition within s.14(1)(b) on conduct which "tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of…".[227] Significantly, the Saskatchewan Human Rights Commission conceded, following the decision of the Saskatchewan

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[221] *Bell, ibid.* at 74 .
[222] *Ibid.*at 99.
[223] *Supra* note 3.
[224] *Supra* note 4.
[225] Section 1 of the *Charter, supra* note 5, states: "The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[226] *R v. Oakes*, *supra* note 114.
[227] *Bell, supra* note 220 at 90.

Court of Appeal in *Red Eye 3*,[228] that "only those messages which have a discriminatory effect by attacking the human dignity of groups and individuals are prohibited by s.14".[229] There is a degree of hostility in the judgement of Hunter J. towards the restriction on free speech imposed by s.14. After observing that "one's initial reaction is that it seems to be an undue restriction on the freedom of expression"[230], Hunter J. stated that she was nonetheless "bound to follow"[231] the Supreme Court of Canada's decision in *Taylor*, and held that s.14 was saved by s.1 of the *Charter*.

Justice Hunter's reluctance to endorse the legitimacy of s.14 was also evident in her disposition of the application on its merits. Without expressing a conclusion as to whether the stickers violated s.14, Hunter J. did issue the injunction sought, but only in relation to "the sticker which depicts the caricature of a person of East Indian origin"[232], on the basis that the representative of the Sikh community was the only plaintiff with standing.

Bell appealed and the Commission cross-appealed to the Saskatchewan Court of Appeal.[233] The Court of Appeal's decision is best known for its confirmation that s.14 is constitutionally valid, notwithstanding that it infringes the right to freedom of expression in s.2(b) of the *Charter*. Applying *Taylor*, the Court confirmed that the aspect of s.14 which prohibits conduct involving exposure to hatred was "unquestionably a reasonable limit".[234] In addition, the Court held that that part of s.14 which prohibited conduct which "ridicules, belittles or affronts dignity" was also a reasonable limit, noting that it was confident that this phrase would not be interpreted as setting too low a threshold, particularly in light of the presence of the statement in s.14(2) that "[n]othing in subsection (1) restricts the right to freedom of speech under the law upon any subject."

It is likely that one of the reasons why the Court found it unnecessary to set out a detailed defence of its validity conclusion was that it already regarded it as settled that s.14 should be read down in accordance with the earlier Saskatchewan Court of

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[228] *Red Eye 2*, supra note 208.
[229] *Bell,* supra note 220 at 91.
[230] *Ibid.* at 94.
[231] *Ibid.*
[232] *Ibid.* at 99.
[233] *Bell 2, supra* note 220.
[234] *Ibid.* at 381 per Sherstobitoff J.A..

Appeal decision in *Red Eye 3*.[235] This is evident in the manner in which the Court laid out what would be need to be established in order to be satisfied that, in selling the stickers, Bell had breached s.14(1):

> …Bell was guilty of a s.14(1) discriminatory practice if he:
>
> (1) published or displayed on any land or premises,
>
> (2) a notice, sign, symbol, emblem, article, statement or other representation,
>
> (3) the purpose or effect of which,
>
> (a) exposed or tended to expose to hatred, belittled, ridiculed or otherwise affronted the dignity of the racial and religious groups depicted therein; *and*
>
> *(b) caused or tended to cause others to engage in a discriminatory practice against those groups of persons in contravention of Part II of the Code*.[236]

The Court of Appeal did not attempt to defend the judicial addition of the emphasised portion to the wording of s.14(1) endorsed by the Saskatchewan legislature, but simply offered this formulation after endorsing and quoting extensively from the judgement of Cameron J.A. in *Red Eye 3*. So, far from representing appellate court endorsement of the position that a provincial human rights law which prohibited conduct which "ridiculed, belittled or…affronted the dignity" of an identified group can be reconciled with the right to free expression in s.2(b) of the *Charter*, the clear implication of the decision of the Saskatchewan Court of Appeal in *Bell* is to the contrary—only if this portion of s.14 is read down so as to be of no practical effect can it be saved from constitutional invalidity.

Having settled the constitutional validity issue, the Court of Appeal ruled that there was "ample evidence" to support a finding that the stickers violated s.14, even with the heightened threshold achieved by the judicially added 'discriminatory effect' requirement :

> The stickers, by their use of strong images, rather then words, appeal to emotion as much as to reason and their purpose and effect is unmistakable: they expose or tend to expose those groups represented by the images to all of the things which constitute

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[235] Sherstobitoff J.A. conceded that the Court's reasons for this conclusion were "rather perfunctory …"(*ibid*. at 382).

[236] *Bell 2, supra* note 220 at 378 [Emphasis added].

> hatred as here defined. They do this by showing the groups depicted to the viewer as being different from the other members of society in a malevolent way, attributing to them undesirable characteristics such as dangerousness, untrustworthiness, lack of cleanliness, lack of emotion, inferior intelligence, dishonesty and deceit.… And all of this is reinforced and driven home by the circle and slash superimposed over the image, the universal symbol for forbidden, not allowed or not wanted.…
>
> As to the second part of the third element, that the display of the stickers caused or tended to cause others to engage in discriminatory practices in contravention of Part II of the Code, the inescapable inference is that was both the purpose and effect of any display of the stickers.… Bell, by displaying them for sale and selling them, provided those who might be inclined to act in contravention of Part II the means to do so. For example, a businessman at his place of business, or a provider of public accommodation at the premises that he had to let, by posting the sticker or stickers at the entrance would make it clear that any goods, services or amenities provided would not be made available to the groups depicted, or at least that their trade was not wanted.[237]

Finally, the Court ruled that the Saskatchewan Court of Queen's Bench had erred in denying standing to the Saskatchewan Human Rights Commission, and issued an injunction restraining Bell from selling or distributing all three of the stickers.[238]

Sherstobitoff J.A.'s choice of hypothetical scenario to demonstrate the likely effect of the stickers sold by Bell can be regarded as emblematic of the Court of Appeal's restrictive approach to the interpretation of Saskatchewan's hate speech law, not only in *Bell*, but also in the earlier *Red Eye 3*. The scenario is, in essence, a version of the classic 'whites only' sign which was the motivation for Canada's original, and unquestionably narrow, provincial human rights law hate speech prohibition—Ontario's *Racial Discrimination Act* 1944 (discussed above in Part 3.1). And yet it is clear that the Saskatchewan legislature, by enacting s.14 of the *Saskatchewan Human Rights* Code in 1979, and by further expanding its scope in 1989, intended to prohibit a broader range of forms of harmful communication than was covered by the traditional discriminatory signs and symbols formulation, in order to provide enhanced protection to victims of hate speech and to set a higher community standard of acceptable public behaviour. However, such was its concern for limiting the threat posed by s.14 to free speech imperatives, the Court of Appeal felt compelled to reign

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[237] *Ibid.* at 379-380.
[238] *Ibid.* at 384.

in the prohibition by reading down the harm component of the definition so to always require evidence that the communication in question carried with it the likelihood that the target group will be subjected to unlawful discrimination.

This tendency for free speech sensitivity to be manifested, not in successful challenges to the constitutional validity of legislation, but in the adoption of restrictive interpretations of the scope of hate speech prohibitions, is not exclusive to Saskatchewan. As will be demonstrated below, it can also be observed in a number of decisions handed down by tribunals and courts in other provinces. However, this tendency towards narrow construction is not universal, as the most recent case to come before a Saskatchewan Board of Inquiry demonstrates.

Sexual Orientation: Hellquist, Roy and Dodds v. Owens and Sterling Newspapers Company operating as the Star Phoenix [239]

Hugh Owens placed an advertisement in the June 30th, 1997 issue of the *Saskatoon Star Phoenix* newspaper that "consisted of four passages from the Bible in red ink, followed by an equal sign and two stick men holding hands inside a red circle with a line through the stick men." [240]

The Saskatchewan Human Rights Board of Inquiry found that the combined effect of the "universal symbol for forbidden"[241] and the bible passages which are commonly cited as evidence of the wrongfulness of homosexuality and as justification for punishment or persecution of gays and lesbians was such that the advertisement breached s.14(1):

> It is clear that the advertisement is intended to make the group depicted appear to be inferior or not wanted at best. When combined with the biblical quotations, the advertisement may result in a far stronger meaning. It is obvious that certain of the biblical quotations suggest more dire consequences and there can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule.[242]

Notably, although the Board of Inquiry summarised the elements of s.14 with reference to the Court of Appeal decision in *Bell* (including the 'additional'

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[239] (2001), 40 C.H.R.R. D/197 (Sask. Bd. Inq.) [*Star Phoenix*].
[240] *Ibid.* at D/197.
[241] *Ibid.* at D/200.
[242] *Ibid.*

requirement of likely discriminatory effect), when it turned to the facts at hand, and the merits of the case, there was no mention of this requirement. The Board's conclusion that the advertisement breached s.14(1) appeared to be based simply on its finding that the contents of the advertisement "would expose or tend to expose homosexuals to hatred or ridicule".[243]

The Board was also called upon to consider the effect of the standard free speech rider in s.14(2).[244] However, it simply quoted from and relied on the authority of the Saskatchewan Court of Appeal decision in *Bell* to find that s.14(1) of the Code was a reasonable restriction on Owens' right to freedom of expression. The Board prohibited Sterling Newspapers from accepting the advertisement for publication in the future and ordered that it pay each complainant $1,500 in damages. The Board prohibited Owens from displaying the advertisement contents in any medium and ordered that he also pay each of the complainants $1,500 in damages.

An appeal by Owens to the Saskatchewan Court of Queen's Bench was unsuccessful,[245] Barclay J. confirming both the correctness of the Board's finding of fact, and its ruling as to the constitutionality of s.14(1). At the time of writing, an appeal to the Saskatchewan Court of Appeal was pending.

4.2.3 British Columbia

In 1993, the prohibition on discriminatory signs and symbols in s.2 of the *Human Rights Act* 1984 was replaced with a broader hate speech provision. The prohibition is now found in Section 7 of the British Columbia *Human Rights Code* 1996[246]:

> A person must not publish, issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that
>
> (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons,
>
> (b) is likely to expose a person or a group or class of persons to hatred or contempt

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[243] *Ibid.*

[244] Section 14(2) of the *Saskatchewan Human Rights Code* 1979 (*supra* note 194) provides that: "Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject."

[245] *Hellquist v. Owens*, 2002 SKQB 506, 45 C.H.R.R. D/272.

[246] R.S.B.C. 1996, c. 240.

> because of the race, colour ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.
>
> (2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

The amendment generated considerable controversy.[247] In addition to vigorous debate in the legislature,[248] enactment of the legislation was greeted with strong media criticism. The targets of criticism were numerous, including British Columbia's New Democratic Party government, the British Columbia Human Rights Commission, human rights tribunals generally, and the very notion of 'human rights' law (as well as the Supreme Court of Canada). The legislation was described in a *Globe and Mail* editorial as an example of human rights law "being twisted, distorted and stood on its head in a bid to...stifle free speech."[249]

One of the specific criticisms directed at the new provisions was that the hate speech prohibition was not accompanied by the standard sub-section two free speech rider. Notwithstanding considerable support for the view that the rider was superfluous (see above), its absence from British Columbia's new hate speech legislation was seized upon as evidence that the legislature had paid insufficient attention to the right to free speech. However, if opponents of the legislation were seriously worried that the absence of a rider would place free speech arguments off limits when it came time to adjudicate on alleged breaches of the legislative prohibition their concerns were very much unfounded. Even in the absence of the standard subsection two rider, the task of negotiating the balance between protecting free speech and sanctioning hate speech has dominated the deliberations of the British Columbia Human Rights Tribunal in those cases in which it has been called upon to adjudicate on an alleged breach of s.7 of the British Columbia *Human Rights Code* 1996.

Canadian Jewish Congress v. North Shore Free Press and Collins[250]

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[247] See e.g., R. Matas, "Hate-law changes to proceed in B.C.: Concern raised about rights", *The Globe and Mail* (16 June 1993) A4.

[248] See, e.g., British Columbia*, Legislative Assembly, Official Report of the Debates of the Legislative Assembly (Hansard),* 11(6) (16 June 1993) at, 7338f; 11(7) (17 June 1993) at 7371f.

[249] Editorial, "A criminal abuse of human rights" *The Globe and Mail* (19 June 1993), D6.

[250] (1997) 30 C.H.R.R. D/5 [*CJC*].

In 1994 the Canadian Jewish Congress lodged a complaint with the (then) British Columbia Council of Human Rights alleging a contravention of s.2 of the *Human Rights Act* 1984[251]. The complaint related to an opinion column published in a Vancouver community newspaper, the *North Shore News* on March 9th, 1994. The author (Doug Collins) and the publisher (North Shore Free Press Ltd.) were named as respondents. The complaint was not formally heard until May 1997. In the interim the *Human Rights Act* 1984 had been replaced by the *Human Rights Code* 1996 and the Council of Human Rights had been replaced by the British Columbia Human Rights Commission and the British Columbia Human Rights Tribunal. Therefore the complaint was treated when it came before the Human Rights Tribunal as a complaint under s.7 of the 1996 Code that superseded (but was identical to) s.2 of the earlier legislation.

The complainant claimed that the article published in the *North Shore News* on March 9th was likely to expose Jewish people to hatred or contempt on the basis of their race, religion or ancestry, and therefore, was in contravention of s.7(1)(b). In the newspaper column Collins expressed the opinion that the Steven Spielberg film "Schindler's List" would "run away with the Academy Awards", not because it was deserving of the honour, but because "the Jewish influence is the most powerful in Hollywood" and "what happened to the Jews during the Second World War is not only the longest lasting but also the most effective propaganda exercise ever."[252] Referring to the number of Jews killed during the Holocaust, Collins described the commonly cited figure of six million as "nonsense". He suggested that far too much attention was paid to the Jewish Holocaust: "There have been many holocausts but most of them have hardly warranted a paragraph, let alone movies."[253]

Free speech considerations had an explicit and immediate effect on the proceedings in *CJC*. Before addressing the merits of the complaint the Tribunal was asked to rule on the constitutional validity of s.7(1)(b) of the *Code*. In addition to arguing that the section was *ultra vires* because it was a criminal law which "trenche[d] on federal criminal law jurisdiction under s.91(27) of the *Constitution Act*, 1867"[254] (an argument which the Tribunal rejected[255]), the respondents argued that

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[251] R.S.B.C. 1984, c. 22.
[252] *CJC, supra* note 250, at D/49.
[253] *Ibid.*
[254] *Ibid.* at para. 34.

"speech", and specifically, "political speech" was a subject of exclusive federal jurisdiction. The Tribunal considered that the only possible basis upon which this contention could be supported was the "implied bill of rights doctrine" which "asserts that certain very fundamental rights, freedom of political speech in particular, cannot be abridged by either level of government."[256] However, the current status of this doctrine in the courts was unclear. In any event, the Tribunal concluded that hate speech could not be protected by the doctrine because, following Dickson C.J. in *R v. Keegstra*,[257] it is "'inimical' to the workings of democracy",[258] the facilitation of which constitutes the rationale for the idea of special protection for political speech.

The primary free speech objection advanced by the respondents was that s.7(1)(b) of the BC *Human Rights Code* was invalid by virtue of inconsistency with s.2(b) of the *Canadian Charter of Rights and Freedoms*. Section 2 provides, inter alia, that "[e]veryone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". From the outset, it was not disputed that s.7(1)(b) of the BC *Human Rights Code* did infringe freedom of expression in s.2(b) of the *Charter*. Debate focused on whether or not s.7(1)(b) was nonetheless valid by virtue of s.1 of the *Charter*.[259]

For the Tribunal then, the task was to interpret s.7(1)(b) in light of the *Charter*, and to determine whether the section was a reasonable limit, using the test endorsed by the Supreme Court of Canada in *R v. Oakes*.[260] The fact that the provision was contained in remedial human rights legislation was relevant. Such legislation is generally "consonant with the *Charter*'s guarantees rather than antagonistic to them"[261] so that "decision-makers should take particular care when interpreting a human rights provision in light of the *Charter* to give the provision its fullest possible effect short of overshooting constitutional limits."[262] The examination required by s.1 of the *Charter* involves a balancing of the "constitutional values furthered by the

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255 *Ibid.* at para. 56.

256 *Ibid.* at para. 65. See *Ontario Public Service Employees' Union v. Ontario*, [1987] 2 S.C.R. 2, (1987) 41 D.L.R. (4th) 1.

257 *Supra* note 3.

258 *CJC, supra* note 250 at para. 72.

259 See *Supra* note 225.

260 *Supra ,* note 114.

261 *CJC, supra* note 250 at para. 83.

262 *Ibid.* at para. 85.

legislative provision against the right or rights infringed..."[263] Context is central to this analysis, and in the present case consideration was given to "the anti-Semitism context, the media context, and the [local] community context."[264]

The Tribunal concluded that the infringement of free speech caused by s.7(1)(b) of the BC *Human Rights Code* was constitutionally valid:

> Accepting that s.7(1)(b) of the *Code* infringes the guarantee of freedom of expression in s.2(b) of the *Charter*, I find that the objective of the measure is pressing and substantial, and that the measure itself is proportional to the objective.… It is rationally connected to the legislative objective in that it is not arbitrary, or irrational, nor does it overreach the justifiable limits of the objective. Further, it is minimally impairing of freedom of expression in that there appears to be no alternative measure that is both significantly less intrusive of freedom of expression and equally effective to attain the legislative objective of s.7(1)(b). Finally, considering the likely impact of the provision, I find that its deleterious impact on freedom of expression is outweighed both by its objective and by its salutary effects. In sum, s.7(1)(b) of the *Code* is a reasonable limit on freedom of expression that is demonstrably justified in a free and democratic society. It is constitutionally valid.[265]

This conclusion rested on the Tribunal's preference for a narrow reading of the scope of the s.7(1)(b) prohibition (see below). Significantly, the Tribunal observed that "…a broader interpretation of the reach of s.7(1)(b) would not be constitutionally supportable."[266] In this respect, the decision of the British Columbia Human Rights Tribunal in *CJC* provides an unequivocal illustration of the way in which a concern for minimising the detriment caused to the right to free speech has resulted in relatively narrow interpretations of the scope of legislative restrictions on hate speech. The case illustrates that there is a very important nexus between the question of constitutional validity and the question of the breadth of provincial prohibitions on hate speech. In *CJC*, resolution of the constitutional validity question did not exhaust the impact of free speech sensitivity on the decision of the BC Human Rights Tribunal. The Tribunal's interpretation of the scope of s.7(1)(b) was very clearly influenced by what the Tribunal regarded as the need to interpret the prohibition in light of the *Charter* (and the right to freedom of expression in particular). This influence was manifested in two ways.

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[263] *Ibid.* at para. 86.
[264] *Ibid* at para. 88.
[265] *Ibid.* at para. 243.
[266] *Ibid.* at para. 244.

First, the *Charter* was, unsurprisingly, a factor in the Tribunal's interpretation of the phrase "hatred or contempt" as establishing a high harm threshold ("unusually strong and deeply-felt emotions of detestation, calumny and vilification"[267]), consistent with the interpretation of the same phrase[268] by the Supreme Court of Canada in *Taylor*.[269] The Tribunal quoted a passage from the decision of Dickson C.J. in that case in which the Chief Justice endorsed an interpretation of similar federal legislation which ensured that it "extend[ed] only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity."[270]

Second, and more controversially, free speech sensitivity led the Tribunal to rule that determining whether there had been a breach of s.7(1)(b) involved a two part test:

> First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt in the context of the expression?
>
> Second, assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?[271]

On the face of it, there is nothing about the wording of s.7(1)(b) which suggests that it is necessary to determine whether the conduct in question *expresses* hatred or contempt before turning to assess the likely *effect* of that conduct. The first limb of the test clearly narrows the scope of the prohibition and makes it more difficult for a complainant to establish that the legislative standard has been breached. The Tribunal expressly identified concerns for limiting the impact of the legislative restriction on free speech as the motivation for this interpretation:

> The first requirement flows from an appreciation of the constraints on restriction on freedom of expression imposed by the *Charter*. In my view, the section would be too chilling of fair commentary on sensitive

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[267] *Ibid.* at para. 121.
[268] As it appears in s. 13(1) of the *Canadian Human Rights Act* 1977 (*supra* note 2).
[269] *Supra* note 4.
[270] *CJC, supra* note 250 at para. 121.
[271] *Ibid.* at para. 245.

> and controversial issues if a message that was not hateful or contemptuous in itself could be caught by this prohibition.[272]

It is questionable whether there is a meaningful distinction between whether conduct is hateful or contemptuous "in *itself*", and in its *effect* (unless the former inquiry involves an assessment of the respondent's intention or motivation when engaging in the conduct—a restrictive approach which there is no indication that the Tribunal intended to adopt).

Turning to the newspaper article in question, the Tribunal held that the article was clearly anti-Semitic:

> Reading the article itself, even without the benefit of evidence on its meaning, I have no hesitation in finding that it is anti-Semitic. It says, either directly or by clear implication that films like *Schindler's List* are hate propaganda by Jews against Germans; that the generally accepted figure of six million Jewish victims of the Holocaust is grossly inflated and the Holocaust is no different from other wartime mass killings; that the popularity of the film and its likely success in the Academy Awards is a product of Jewish control of Hollywood. I find that a reasonable person would understand this to be the meaning of the column. I further find that a reasonable person would consider the column to be anti-Semitic, offensive and hurtful to Jewish people.[273]

However, the Tribunal held that the mere fact that the article was anti-Semitic did not necessarily mean that it contravened s.7. When the first limb of the test was applied, the Tribunal concluded that although the tone of the article was nasty, deliberately provocative and insulting, it "does not capture the degree of calumny, detestation or vilification signified by 'hatred or contempt' as the phrase is used in s.7(1)(b)".[274]

The impact of the heightened threshold created by the two-limb test was vividly illustrated by the Tribunal's conclusion that although the article did not *express* hatred or contempt of Jews, it's publication was (as per the second limb of the test) likely to have the *effect* of increasing the risk that Jews would be exposed to hatred or contempt. However, as the Tribunal had decided that both limbs of the test needed to be established in order to place the article within the definition of the legislative prohibition, the complaint was dismissed.

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[272] *Ibid.* at para. 131.
[273] *Ibid.* at para. 249.
[274] *Ibid.* at para. 252.

Abrams v. North Shore Free Press and Collins[275]

Doug Collins' opinion pieces in the *North Shore News* were the subject of a separate complaint lodged by Harry Abrams in 1994. Whereas the complaint in *CJC* had been lodged in relation to a single newspaper column, the complaint in *Abrams* was lodged in relation to four columns that appeared between January and June 1994.[276]

The matter was heard in two parts. A decision on the merits—that is, whether there had been a breach of s.7(1) of the British Columbia *Human Rights Code* 1996—was handed down in 1999. A decision on the constitutional validity of s.7(1) was handed down in 2001, in response to an argument that that the provision infringed the right to freedom of expression in s.2(b) of the *Charter* and could not be saved by s.1.

The merits inquiry focused on s.7(1)(b) of the *Code*, the complainant having withdrawn his original contention that the publications also breached s.7(1)(a). The Tribunal began its analysis by considering whether the interpretation of s.7(1)(b) by a differently constituted Tribunal in *CJC* was correct. Specifically, the Tribunal considered the respondent's argument that in *CJC* the Tribunal had inappropriately read down the scope of the prohibition contained in s.7(1)(b) so as to ensure that the provision was compatible with the *Charter*. The respondent's argument focused on the first part of the two-part test endorsed in *CJC*—that is, asking "whether a reasonable person would understand the message as expressing hatred or contempt":[277]

> The Respondents submit that this part of the test limits the application of the section, and that the Tribunal adopted this part of the test explicitly to reduce the risk that the section may infringe the *Charter*. They submit that there is nothing in the legislation that limits the application of the section to messages that express hatred or contempt. The Tribunal, therefore, intruded into the function of the legislature.…
>
> In essence, the Respondents' position is that the interpretation adopted in the *CJC* case…set a higher threshold than the Legislature intended.[278]

The Tribunal in *Abrams* noted that this might seem a counterproductive argument for a respondent to advance (given that if successful, it might increase the

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[275] (1999) 33 C.H.R.R. D/435 [*Abrams*].

[276] *Ibid.* at para. 5. Abrams applied to have his complaint heard with the *CJC* complaint, but the respondents opposed this application and the Tribunal refused to allow it.

[277] *Abrams, supra* note 275 at para. 31.

[278] *Ibid*. at para. 32-33.

chance that the conduct in question would be considered to fall within the enlarged scope of the prohibition), but recognised that it was likely that this strategy was designed to increase the size of the 'target' for the respondent's constitutional challenge to s.7 of the *Human Rights Code.*

The Tribunal in *Abrams* concluded that the two part test adopted previously by the Tribunal in *CJC* did not involve an inappropriate reading down of s.7(1)(b). Although "the *Charter* played an important role in the development of the two-part test"[279], the interpretation preferred in *CJC* was "a reasonable one considering the language and purposes of the *Code*."[280]

It did not follow, however, that the Tribunal in *Abrams* was obliged to apply the interpretation of s.7(1)(b) which had been endorsed in *CJC*, as "an administrative tribunal is not bound by its prior decisions".[281] While recognising the desirability of consistent application of the law, the Tribunal did "not think the interests of justice would be served by rigidly applying a test that was developed after so little experience with the legislation."[282] Nonetheless, the Tribunal member concluded that "for the purpose of this case, I intend to use this two-part test as the framework for my analysis,"[283] satisfied that it "encompasses, with some modifications, those considerations which I consider to be necessary in determining whether a publication contravenes s.7(1)(b)."[284]

Consistent with the decision in *CJC*, the Tribunal observed that the mere fact that a message was 'anti-Semitic' did not necessarily mean that it exposed Jews to hatred or contempt for the purpose of s.7(1)(b) of the *Code*:

> It is necessary to go behind the label and inquire into the nature of the anti-Semitic speech.
>
> In this case, the columns contain themes that reinforce some of the most virulent forms of anti-Semitism. They convey notions that Jews conspire to manipulate society's most important institutions for their own gain; and that, through control of the media, they have

[279] *Ibid*. at para. 37.
[280] *Ibid*. at para. 39.
[281] *Ibid*. at para. 41.
[282] *Ibid.* at para. 46.
[283] *Ibid.* at para. 47.
[284] *Ibid.* The tone of the Tribunal's discussion of this issue suggests that it had some sympathy for the view that the test adopted in *CJC* may have set too high a threshold for complainants, but that in the interest of consistency and certainty the setting of a different threshold in *Abrams* should be avoided.

> perpetrated a massive fraud to exaggerate their suffering during the Holocaust. The Jews are portrayed as selfish, greedy and manipulative.…
>
> In my opinion, collectively, and through repetition of anti-Semitic themes, the columns take on a vicious tone that taps into a centuries-old pattern of persecution and slander of Jews. They perpetuate the most damaging stereotypes of Jews.[285]

The Tribunal concluded that, collectively, the columns written by Collins and published in the *North Shore News* would be regarded by a reasonable person as expressing hatred and contempt (first step of test) and "likely to make it more acceptable for others to manifest hatred or contempt against Jewish people"[286] (second step). It followed that the publication of the columns was contrary to the prohibition contained in s.7(1)(b) of the *Code* and that the complaint should be upheld. The Tribunal ordered the respondents to "cease publishing statements that expose or are likely to expose Jewish persons to hatred or contempt and to refrain from committing the same or a similar contravention,"[287] pay the complainant $2,000 in damages, and publish a summary of the Tribunal's decision in the *North Shore News*.

In April 1999 Doug Collins sought judicial review of the Tribunal's decision in the Supreme Court of British Columbia and also applied to have the outstanding question of the constitutional validity of s.7(1)(b) determined in that court rather than the Tribunal. These applications were unsuccessful and Quijano J. ordered that the case be referred back to the Tribunal.[288] On appeal the British Columbia Court of Appeal confirmed that the BC Human Rights Tribunal did have jurisdiction to adjudicate on the constitutional questions raised by the case, and that the decision to remit was correct.[289]

The constitutional challenge to s.7(1) was heard by the Tribunal in 2001, with a decision handed down in November of that year.[290] The Tribunal endorsed the analysis and conclusion of the earlier decision in *CJC*: s.7(1)(b) of the *Code* does

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[285] *Abrams, supra* note 274 at para. 68-70.
[286] *Ibid.* at para. 83.
[287] *Ibid*. at para. 87.
[288] *Collins v. Abrams* (1999), 19 Admin L.R. (3d) 269, [1999] B.C.J. No 2859 (BCSC) (QL).
[289] *Collins v. Abrams* (2001), 196 D.L.R. (4th) 570, 2001 BCCA 22.
[290] *Abrams v. Collins (No 5),* 2001 B.C.H.R.T. 43. Collins died before the decision was rendered but the Tribunal decided that it would still be appropriate to proceed and resolve the matter.

infringe s.2(b) of the *Charter*, but "it is demonstrably justifiable in a free and democratic society and is therefore constitutionally valid." [291]

Stacey v. Campbell and Choose Life Canada[292]

In 1998 Kevin Stacey lodged a complaint with the British Columbia Human Rights Commission alleging that an advertisement which had been placed in the *Globe and Mail* by Kenneth Campbell and Choose Life Canada breached s.7(1)(a) of the *Human Rights Code* 1996. The advertisement, under the headline "CANADA'S SUPREME COURT HAS NO BUSINESS IMPOSING 'BATHHOUSE MORALITY' ON THE CHURCHES AND IN THE NATION'S LIVING ROOMS!", was essentially a criticism of a recent decision of the Supreme Court of Canada which had held that Alberta's human rights legislation was contrary to s.15 of the Charter because it failed to include sexual orientation as one of the recognised grounds of unlawful discrimination.[293] The advertisement contained a number of negative statements regarding homosexuality focusing on sexual conduct, with references to "buggery" and sodomy", and included a "Manifesto of Hope" which, in the words of the Tribunal

> …indicates opposition to same-sex marriage and parentage, recommends a prohibition on the ability of homosexual youth support organisations from disseminating certain information in the schools, and urges government agencies to register, treat and monitor every individual with HIV, Hepatitis-C or AIDS.[294]

Before the Tribunal, Stacey applied to amend his complaint to include an allegation that the advertisement also infringed s.7(1)(b) in that it exposed gays and lesbians to hatred or contempt. The Tribunal refused this request on the basis that it would be prejudicial to the respondent. This procedural decision turned out to be

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[291] *Ibid.* at para. 37. Collins' wife, on behalf of her husband's estate, applied for judicial review of the Tribunal's decision on constitutional validity in the Supreme Court of British Columbia. Smith J. ruled that the death of Collins rendered the petition for judicial review moot and ordered that it be dismissed: *Collins v. Abrams*, 2002 BCSC 1774. The strongest argument advanced in support of allowing the judicial review application to proceed was that dismissing the application would leave the question of the constitutional validity of s.7 of the *Human Rights Code* "untested" by a court (*ibid.* at para. 51) and that there was "a social cost in leaving the matter undecided" (*ibid.* at para. 53). However, Smith J. ruled that such considerations were outweighed by the demands of "judicial economy' ,at para. 58.

[292] 2002 B.C.H.R.T. 35 [*Stacey*].

[293] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, (1998) 156 D.L.R. (4th) 385.

[294] *Stacey, supra* note 292 at para. 53.

critical to the outcome of the case. The essence of the complainant's case was that the advertisement was "hateful and offensive."[295] The Tribunal rejected the complainant's argument that the "hateful communications [covered by s.7(1)(b)] are a subset of the discrimination prohibited by s.7(1)(a)."[296] Consequently, the complainant was forced to couch his submissions in such a way as to establish a breach of s.7(1)(a) ("indicates discrimination or an intention to discriminate") rather than a breach of s.7(1)(b) ("likely to expose to hatred or contempt").

Stacey failed to persuade the Tribunal that the advertisement indicated discrimination or an intention to discriminate. In reaching this conclusion the Tribunal relied on a surprisingly narrow interpretation of the scope of s.7(1)(a), and a high evidentiary threshold in terms of evidence of discrimination. On the first issue the Tribunal interpreted s.7(1)(a) as requiring evidence that the communication "indicates discrimination or an intention to discriminate *with respect to the fields of activity that are covered by the other sections of the Code*,"[297] even though there is no such limitation expressed in the legislation, and the British Columbia legislature had removed such a limiting phrase[298] in 1993 when it expanded the narrow discriminatory signs and symbols prohibition and replaced it with a broader hate speech prohibition.

The Tribunal also purported to find support for this approach in the interpretation of equivalent legislation in *Sambo's Pepperpot*[299] and *Red Eye*[300] (Saskatchewan), *Bramhill*[301] (Nova Scotia), and *Kane 4*[302] (Alberta). However, this marshalling of authority is unconvincing because in actual fact, in each of these cases, the adjudicatory body adopted a relatively broad interpretation of the phrase "indicates discrimination" and certainly could not be regarded as having endorsed or employed a reading down of the scope of the phrase "indicates discrimination" as the Tribunal in *Stacey* suggested.[303]

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[295] *Ibid.* at para. 50.
[296] *Ibid.* at para. 24.
[297] *Ibid.* at para. 34 [Emphasis added].
[298] See *Hunky Bill, supra* note 60.
[299] See *supra* note 40.
[300] *Red Eye 3*, s*upra*, note 213.
[301] *Supra,* note 70.
[302] *Kane 4, infra* note 331.
[303] In each of these cases the conduct in question involved the reinforcement of negative stereotypes regarding the target group, rather than anything in the way of encouragement or incitement to

The Tribunal commented on the failure of the complainants to introduce sufficient evidence "that the advertisement had an adverse effect, or likely effect, on the basis of sexual orientation in any of the fields of activities covered by the *Code*."[304] Even in the absence of expert testimony[305] it is hard to see how the Tribunal could fail to be satisfied that the advertisement's perpetuation of negative stereotypes of gays and lesbians could, for example, fortify the resolve of some employers in British Columbia to discriminate against gays and lesbians—just as the Saskatchewan Board of Inquiry in *Sambo's Pepperpot* was satisfied that signs and symbols that perpetuated negative stereotypes of African Canadians could increase the risk that they would be subjected to discrimination in the field of employment.

It was somewhat disingenuous for the Tribunal hold out this approach as consistent with previous interpretations of equivalent prohibitions in other provincial human rights statutes. It would have been preferable for the Tribunal to have articulated more fully the reasons for a narrow reading of the scope of s.7(1)(a). It is possible that one of the factors was that, given that the legislature had, in 1993, expanded the scope of the prohibition to include conduct which was likely to expose to hatred or contempt (that is, the current s.7(1)(b)), the Tribunal did not feel any pressure to broadly interpret the "indicates discrimination" phrase—pressure of the sort which some previous adjudicators appear to have felt in the absence of any alternative mechanisms for sanctioning objectionable material.[306] Less speculatively, it is clear that concern for the impact of the s.7(1)(a) prohibition on the right to freedom of expression under s.2(b) of the *Charter* and the right to freedom of religion under s.2(a) of the *Charter* was a significant influence on the relatively narrow interpretation of the scope of s.7(1)(a) preferred by the Tribunal:

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discrimination. If anything then, these decisions might be regarded as having 'stretched' the parameters of the discriminatory signs and symbols prohibition rather then as having read it down. In addition, the Tribunal in *Stacey* (*supra* note 292) did not acknowledge the decision in *Kane* (*supra* note 91), in which the Alberta Board of Inquiry had expressly concluded that the phrase "indicates discrimination" should not be read down in this way.

[304] *Stacy, supra* note 292 at para. 50.

[305] *Ibid.*

[306] It is likely that, even on a conservative interpretation of the scope of s.7(1)(b) (such as the two-part test adopted by the Tribunal in *Abrams v. North Shore Free Press and* Collins (*supra* note 275)) that the advertisement in question violated the prohibition on communications likely to expose individuals or groups to hatred or contempt. The Tribunal was at pains to make clear that it had not made any ruling on this issue, and that it decision in this case should "not…be read as a determination that the advertisement, or others like it, are permitted under the *Code*: *Stacey, supra* note 292 at para. 56.

> On its face, broader interpretations than the one I have advanced are possible. The provision could be interpreted so as to prohibit publications of all statements that indicate discrimination or an intention to discriminate on any of the prohibited grounds, whether or not the discrimination itself would contravene the *Code*.… However, in my opinion, such an interpretation would have a more severe impact on the Respondents' freedom of expression and religion than the interpretation I have proposed.[307]

Analysis of the three hate speech decisions handed down by the British Columbia Human Rights Tribunal since 1996 supports the central argument advanced in this article regarding the impact in which free speech sensitivity has impacted on the operation of provincial hate speech laws. Free speech sensitivity has not supported findings that s.7 of the *Human Rights Code* 1996 is constitutionally invalid, but it has prompted the Tribunal to narrowly construct the parameters of the prohibition on hate speech. In two of the three cases (*CJC*, *Stacey*) this tendency was instrumental in the Tribunal's decision to dismiss the complaints on the basis that the conduct in question did not satisfy the elevated threshold.

The British Columbia experience reminds us that even where hate speech legislation successfully negotiates the hurdle of constitutional challenge, it may still provide only limited protection to victims. Indeed, diminished protection may be the price that is paid for ensuring constitutional validity.

4.2.4 Alberta

In 1996 the Alberta *Individual's Rights Protection Act* was overhauled and renamed the *Human Rights, Citizenship and Multiculturalism Act*. The prohibition on discriminatory signs and symbols in s.2 of the old *Act* was repealed and replaced with a broader prohibition on hate speech along the lines of the 1993 amendments in British Columbia. It is now found in s.3 of the *Human Rights, Citizenship and Multiculturalism Act*:[308]

> (1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that

[307] *Stacey, supra* note 292 at para. 37.
[308] R.S.A. 2000, c. H-14.

> (a) indicates discrimination or an intention to discriminate against a person or class of persons, or
>
> (b) is likely to expose a person or a class of persons to hatred or contempt
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.
>
> (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

The expansion of the traditional discriminatory signs and symbols prohibition was one of the recommendations of the Alberta Human Rights Review Panel contained in the 1994 report, *Equal in Dignity and Rights: a Review of Human Rights in Alberta*.[309] The Review Panel noted in its report that "[m]any submissions to the Review indicated that Section 2 of the [Individual's Rights Protection] *Act* is not broad enough and that other media have been used to spread hatred against particular groups."[310] The Review Panel recommended that "the IPRA should be amended to include other public media of communication and that subsection 2(2) be kept as a safeguard of free expression."[311]

Section 3 of the *Human Rights, Citizenship and Multiculturalism Act* certainly broadens the prohibition in the manner proposed by the Review Panel by applying to a broad range of forms of communication. However, the current formulation of Alberta's hate speech prohibition also expands the traditional discriminatory signs and symbols prohibition in a manner not specifically addressed by the Review: the prohibition applies not only to conduct which indicates discrimination, but also to conduct which is likely to expose an identified group to hatred or contempt.

The records of legislative debate provide no guidance as to why the Progressive-Conservative Government under Premier Ralph Klein chose to effect this reform. In the second reading speech by the Minister of Community Development, Gary Mar, no mention was made of the amendments to the hate speech provisions.[312] In fact, while several aspects of the amending legislation (Bill 24) were the subject of

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[309] Alberta, Alberta Human Rights Review Panel, *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (Edmonton: Alberta Human Rights Commission, 1994).
[310] *Ibid.* at 68.
[311] *Ibid.*
[312] Alberta, Legislative Assembly, *Hansard* (18 April 1996) at 1229 [Alberta *Hansard*].

criticism and heated debate in the legislature, no government or opposition member made mention of the expansion of the prohibition to cover the promotion of *hatred and contempt*, in addition to the promotion of *discrimination*.

While the precise motivation for this reform is difficult to detect, analysis of the records of parliamentary debate on Bill 24 does reveal concerns that the province of Alberta has an unwanted reputation for racial intolerance, and suggests that these concerns played a role in the strengthening and expansion of the existing legislation. For example, Liberal MLA Gary Dickson encouraged any members of the Legislative Assembly who might be of the view that "'this is Alberta; we don't have a problem here when it comes to tolerance and discrimination'"[313] to read Warren Kinsella's *Web of Hate*[314] which "documents the role and rise of Aryan Nations by white supremacist groups in this province".[315] Mr Dickson also noted that:

> This is the province where Jim Keegstra was able to practise his particular brand of intolerance and bigotry for 10 years. We still have taxicabs in the city of Calgary that will be dispatched with all white drivers if the caller requests a Caucasian driver.[316]

In her contribution to the debate on Bill 24 Progressive-Conservative MLA, Yvonne Fritz referred to survey data which revealed that "a significant number of Albertans still hold negative attitudes about people from different cultures and backgrounds".[317]

Cross-party endorsement of such sentiments may explain why there was no expression of concern in the legislature about the reforms' implications for free speech, even though the 1996 amendments to Alberta's human rights statute were almost identical to those which had generated such heated debate when introduced in British Columbia three year earlier. It is also likely that the inclusion of the standard subsection two free speech rider served to mitigate concerns about infringing the right to free speech, even though the effect of the provision is generally regarded as being mainly symbolic.

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313 *Ibid.* at 1230,

314 Warren Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: HarperCollins, 1994).

315 Alberta *Hansard*, *supra* note 312 at 1230.

316 Alberta, Legislative Assembly, *Hansard* (22 May1996) at 2073.

317 Alberta, Legislative Assembly, *Hansard* (29 April 1996) at 1435.

Since the 1996 amendments there have been two decisions by the Alberta Human Rights Panel in relation to alleged violations of s.3 of the *Human Rights, Citizenship and Multiculturalism Act*.

Re Kane [318]

On 31 October 1997 an article appeared in *Alberta Report* magazine entitled "A Canmore Mall Project Ends in a Bitter Feud". The article addressed events that had occurred during the negotiations between a Canadian builder, Fred Schickedanz, and an American promoter, Benson Flanzbaum, associated with a failed commercial property development. The article included references to the amount of gold jewellery worn by Mr. Flanzbaum as well as to his "open shirts" and "hirsute chest." The article also contained the following passage:

> One professional planner comments on the failed project: 'North American commercial real estate is dominated by firms that often happen to be Jewish owned [e.g. Oshawa and Canmore Development]. The retail sector is much the same. Like cliques everywhere, some of these people tend to deal with each other, and Mr. Schickedanz is an outsider.'[319]

A complaint was lodged with the Alberta Human Rights and Citizenship Commission by the Jewish Defense League of Canada and Harvey Kane on May 4th, 1998, alleging that the publication of the article contravened (what was then) s.2 of the *Human Rights, Citizenship and Multiculturalism Act* 1980[320] (now s.3 of the *Human Rights, Citizenship and Multiculturalism Act* 2000). After attempts to resolve the complaint by conciliation failed, the complaint was dismissed. This decision was appealed and the matter was referred to the Alberta Human Rights and Citizenship Commission Panel for determination. Before determining the merits of the complaint the Panel submitted a number of questions of law to the Alberta Court of Queen's Bench for an opinion. The opinion was handed down by Rooke J. on June 29th, 2001.

The questions relevant to the issues being explored in this paper were:

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[318] 2001 A.B.Q.B. 570 [*Kane 3*].
[319] *Ibid.* at para. 2.
[320] R.S.A. 1980, c. H-11.7.

> 3. Can a breach of section 2(1) of the *Act* be found in the face of a defence based on section 2(2)? That is, does section 2(2) bar the Panel from finding a breach of 2(1) when the alleged wrongdoer can establish that he/she is freely expressing his/her opinion?
>
> 4. If section 2(2) is not a bar to finding a breach of section 2(1), can section 2(2) be used after a finding of breach of section 2(1) in order to justify that breach?
>
> 5. What standards must the Panel apply to determine whether a representation "is likely to expose a person or a class of persons to hatred or contempt"? Are different considerations applied to questions of "contempt" as opposed to questions of "hatred"?[321]

In relation to the significance of s.2(2) of the *Act* (i.e. questions 3 and 4) Rooke J. opined that s.2(2) provides neither a defence nor a justification for a breach of s.2(1). He observed that several cases have established that protection from hate or contempt-based expression "is a pressing and substantial objective, and is justified in a free and democratic society."[322] If the protection afforded by legislative restrictions on hate speech could simply be over-ridden by allowing a respondent to place his or her conduct outside the scope of the prohibition by showing that he or she was just expressing an opinion, the rights would be meaningless and defeat the purpose of the legislation. Justice Rooke noted that "excluding opinions from the reach of s.2(1) would go a long way in defeating the purpose of the legislation."[323]

According to Rooke J., although s.2(2) does not create a defence, it does require that in the interpretation and application of s.2(1) freedom of expression must be balanced against the objective of eliminating discrimination.[324] This involves a two-step process. First, the terms "hatred" and "contempt" must be interpreted with an awareness of the need to achieve this balance—ensuring that only serious harms are caught by the prohibition. Second, "once a *prima [facie] breach* is found, the Panel must go on to specifically balance freedom of expression against the particular breach".[325] Apart from stating that an '*Oakes* analysis' (such as was employed by the BC Human Rights Tribunal in *CJC*) was not necessary unless the constitutional validity of the legislation was challenged, it is not clear from the reasons of Rooke J.

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[321] *Kane 3, supra* note 318 at para. 10.
[322] *Ibid.* at para. 67.
[323] *Ibid.* at para. 70.
[324] *Ibid.* at para. 73 (following Dickson C.J. in *Taylor v. Canadian Human Rights Commission*, *supra* note 4.).
[325] *Kane 3, supra* note 318 at para. 77 [Emphasis added.].

what is involved in the 'second step' inquiry mandated by s.2(b), other than "an examination of the nature of the statement in a full, contextual manner which recognizes the objectives and goals of the legislation and is *Charter* sensitive".[326]

On the meaning of the phrase "likely to expose...to hatred or contempt" (question 5) Rooke J. first endorsed the *Taylor*[327] interpretation of the harm threshold established by the reference to "hatred or contempt". In determining the meaning of "likely to expose", Justice Rooke considered and rejected the approach adopted by the BC Human Tights Tribunal in *CJC*—which focused on whether the conduct was likely to *increase the risk* of exposure to hatred or contempt—on the basis that this would set too low a threshold:

> The test proposed in *CJC* would admit of a breach where there is a 1% chance of being exposed to hatred or contempt which is increased by .01%. This would effectively allow a finding of a contravention of the *Act*, despite that the target group is still not "likely" to be exposed to hatred or contempt. I do not believe this is what is intended by the *Act*.[328]

There is a certain irony in this observation. As discussed above, in *CJC* the BC Human Rights Tribunal took great pains to interpret s.7 of the BC *Human Rights Code* in a manner that was highly sensitive to the need to minimally infringe on free speech, and yet the substance of Rooke J.'s criticism is that the Tribunal adopted an interpretation of equivalent legislation which infringed too heavily on the right to freedom of expression. This difference of opinion demonstrates that there is considerable scope for divergence when it comes to the articulation and application of free speech sensitivity while setting the parameters of legislative restrictions on hate speech.

Rooke J. preferred to articulate an "analytical framework rather than a template to be mechanically applied in every case",[329] but expressed approval of the following test:

> First, does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?

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[326] *Ibid.* at para. 85.
[327] *Supra* note 4.
[328] *Kane 3, supra* note 318 at para. 122.
[329] *Ibid.* at para. 124.

> Second, assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt?[330]

It is interesting that even as he expressed doubts about the necessity of a single 'test', Rooke J. nonetheless felt compelled to spell out what he considered to be an acceptable approach in just such terms. This tendency to rely heavily on legal 'tests' which substantially augment the wording of the legislation—a distinctive feature of a number of the decisions handed down in recent years—appears to be a direct consequence of the high degrees of '*Charter* consciousness' and free speech sensitivity that are associated with such determinations. However, it is not clear that this heavily 'legalistic' approach is an effective device for achieving the balancing of interests and values that is at the heart of the interpretation and application exercise.

The Alberta Human Rights and Citizenship Panel accepted that the opinion provided by Rooke J. was binding. Turning to the facts of the case, the Panel found that the article contained "a very powerful image or caricature that amounts to a negative stereotype of Jewish people, more specifically of Jewish businessmen."[331] The message of the article went far beyond that of a failed business deal; the focus was on the religion of Mr. Flanzbaum. The image conveyed was considered in the context of the Jewish experience, which included, as LaForest J. had noted in the Supreme Court of Canada's decision in *Ross v. New Brunswick School District No. 15*,[332] the fact that Jews are "an historically disadvantaged group that has endured persecution on the largest scale."[333] It was further noted "that many of the leading *Charter* cases on freedom of expression and discrimination involve anti-Semitic communications."[334] According to the Panel, the article in question subtly reinforced a notion of Jews being rich, powerful, and conspiring to control business to the exclusion of others.

The Panel observed that the fact that a publication contains anti-Semitic messages does not necessarily mean that it conveys hatred or contempt as per s.2(1)(b) of the *Act*. It held that although the article in the *Alberta Report* perpetuated a

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[330] *Ibid.* at para. 125.

[331] *Kane v. Alberta Report & Byfield* (2002), online: Alberta Human Rights and Citizen Commission <http://www.albertahumanrights.ab.ca/legislation/panel_decis_2002.asp>, [*Kane 4*].

[332] [1996] 1 S.C.R. 825, (1996) 133 D.L.R. (4th) 1 [*Ross*].

[333] Ibid. at 34. [**NOTE: THIS REF IS TO DLR]**

[334] *Kane 4, supra* note 331.

damaging stereotype of Jewish people, it did "not express the extreme level of communication required to amount to hatred or contempt."[335] However it did "indicate discrimination" and was therefore unlawful by virtue of s.2(1)(a) of the *Act*.[336] The Panel held that "the stereotype of Jews contained in the Article indicates discrimination because it discloses a discriminatory belief or attitude that will reinforce prejudice against them."[337]

It is worth noting that the manner in which the phrase "indicates discrimination" was interpreted and applied by the Panel[338] established a relatively low harm threshold. No actual act of discrimination or intention to discriminate is required. The Panel need only be satisfied that the publication of the article would "reinforce prejudice" against Jews which "has the potential of being translated into discriminatory acts".[339] This appears to be at odds with the very high threshold associated with the phrase "likely to expose…to hatred or contempt". There was very little consideration of what *Charter* or freedom of expression sensitivity might demand with respect to the interpretation and application of s.2(1)(a) specifically, notwithstanding that an adverse finding against a respondent in relation to s.2(1)(a) carries the same potential consequences as an established breach of s.2(1)(b).

The Panel did, however, note that in reaching its overall decision it had "carefully balanced the interests of freedom from discrimination and that of the freedom of expression.…"[340] It found that s.2(1) "is directed towards achieving such pressing and sufficiently important objectives that it warrants limiting freedom of expression in this case."[341] In the present case, the respondent's freedom of expression was minimally impaired—the respondents could have avoided the reach of the restriction imposed by s.2(1) simply by excluding the final quotation (attributed to the unnamed "professional planner") from the article. The Panel made no order as to

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335 *Ibid.*

336 Note that in *Canadian Jewish Congress v. North Shore Free Press & Collins, supra* note 250, the British Columbia Human Rights Tribunal did not, after concluding that the article in question did not fall within s.7(1)(b) of the BC *Human Rights Code*, go on and consider the application of s.7(1)(a) (presumably because the complainants had not alleged a breach of this particular provision).

337 *Kane 4, supra* note 331.

338 Based on the approach previously adopted by an Alberta Board of Inquiry in a s.2 decision: *Kane supra* note 91.

339 *Kane 4, supra* note 331.

340 *Ibid.*

341 *Ibid.*

remedies, being satisfied that the respondents' offer of space in the magazine in which the complainants could raise their concerns was sufficient.

The Panel's decision was overturned on appeal by the Alberta Court of Queen's Bench.[342] Clark J. accepted the Alberta Report's argument that the Panel had erred in taking into account expert evidence presented in two British Columbia decisions dealing with equivalent legislative provisions,[343] without bringing this to the attention of the parties and giving them an opportunity to make submissions in relation to the admissibility of, or weight to be attached to, that evidence. Clark J. ordered that the matter be remitted back to the Alberta Human Rights Panel for rehearing, but the complaint was subsequently settled.

Johnson v. Music World[344]

Quintin Johnson lodged a complaint with the Alberta Human Rights and Citizenship Commission in 1997 alleging that the respondents had breached s.2 (now s.3) of the *Human Rights, Citizenship and Multiculturalism Act* by making available for purchase a music CD by Deicide titled, "Upon the Cross" which contained a song called "Kill the Christian", and a CD by Type O Negative titled "Bloody Kisses" which contained a song called "Kill All the White People". Interestingly, the complaint was originally dismissed by the Commission's Director on the basis that subsection 2 "shielded the material based on artistic merit".[345] However, this decision was overturned by the Chief Commissioner in 2000, and the matter was referred to the panel for hearing.

After concluding that the retailers were appropriately named as respondents, given that they had been responsible for displaying (even if not publishing) the CDs in question, the panel moved on to consider the central issue before it: did the retailing of the CDs indicate discrimination or an intention to discriminate against Christians and/or "white" people; or was this conduct likely to expose Christians and/or "white" people to hatred or contempt.

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342 *Alberta Report v. Alberta (Human Rights and* Citizenship Commission) (2002), A.R. 186, 2002 ABQB 1081 (10 December 2002).

343 See *CJC, supra* note 250; *Abrams, supra* note 275 (discussed above).

344 (2003) online: Alberta Human Rights and Citizen Commission <http://www.albertahumanrights.ab.ca/legislation/panel_decis_Johnson.asp> [Johnson].

345 *Ibid.*

Applying the approach endorsed by Rooke J. in *Kane 3*[346], the panel ruled that the sale of the CDs in question did not breach s.2(1), and so dismissed the complaint:

> This panel finds that, while the content and tone of the communications appear on the face of them to be discriminatory, there is very little vulnerability of the target group. The expressions used do not reinforce existing stereotypes, nor do the messages appeal to well-publicized issues. More importantly, however, the medium used to convey the message is extremely suspect, lacks credibility and has a small circulation.…
>
> It is the decision of this panel that there is very little likelihood of a representation to expose a person or class of persons to hatred or contempt in the context of this particular medium which is unlikely to be taken seriously or credibly by the target group.[347]

In reaching its conclusion that the sale of the CDs in question did not breach s.2, it is interesting to note that the Panel attached considerable significance to the fact that 'white' and Christian Canadians are not, relatively speaking, vulnerable groups when it comes to racism, religious intolerance, stereotyping, and discrimination. The legislation is clearly not directed to minority groups only, but the decision in *Johnson* does suggest that members of ethnic or religious majorities may be expected to endure public conduct that, even though it expresses hatred or discriminatory attitudes, is received into a context in which their dominant status means that negative consequences for the group are unlikely. The Panel also attached significance to what it described as the lack of credibility of the medium involved. It is not entirely clear how the Panel defined the relevant medium—music CDs? heavy metal music CDs? right wing fringe heavy metal CDs? It is questionable whether low-volume sales or the niche market for a CD should determine whether the material is placed outside the reach of a legislative restriction on public displays of material that promotes hatred or contempt.

These two recent decisions from the Alberta Human Rights and Citizenship Commission Panel provide further support for the argument advanced in this article regarding the way in which free speech sensitivity has prompted adjudicators to give a restrictive interpretation to the prohibition on communications which promote hatred or contempt: in neither case was this threshold satisfied by the complainant. And yet, we also see in the Panel's decision in *Kane 3* a flexible, relatively low threshold

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346 *Supra* note 318.

approach to the interpretation of the "indicates discrimination" branch of the hate speech prohibition which seems paradoxical, but which is at the same time familiar, being reminiscent of the approach adopted in cases like *Sambo's Pepperpot*, *Bramhill* and *Arts Plus* (discussed above).

4.2.5 The Interpretation of the 'Hatred and Contempt' Laws in Western Canada

In the last two decades, an alleged violation of a provincial human rights law prohibition on conduct which promotes hatred or contempt towards identified groups has been resolved by way of quasi-judicial or judicial adjudication on 10 occasions. In five of these matters the complaint was upheld.[348] At some time during the past 20 years the legislature in each of the provinces of western Canada has taken the decision that the conventional prohibition on discriminatory signs and symbols is inadequate as a legal mechanism for offering protection and an opportunity for redress to victims of hate speech, and that a wider legislative prohibition was needed. The model of hate speech regulation which currently operates in British Columbia, Alberta and Saskatchewan, and which was recently adopted in the Northwest Territories, appears to offer the promised enhanced protection, by applying to a wide range of methods of communication, and by extending to conduct which promotes hatred and contempt, as well as conduct which indicates discrimination.

However, in terms of evaluating whether the 'hatred and contempt' model of hate speech regulation offers more effective protection to target groups, it is necessary to look beyond the raw figure of a 50% complainant success rate in matters resolved by adjudication. Close analysis of the decided cases reveals that despite the appearance of a broader prohibition yielding higher quality protection, in practice, an ostensibly broad prohibition has been interpreted relatively narrowly so that its scope is less than might appear from the face of the legislation.

Certainly, there has been an expansion in the modes of communication covered by the prohibition, reflected in the fact that in the majority of the decisions examined above, the conduct in question was in the form of a newspaper opinion piece—a mode

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[347] *Supra* note 344. Having reached this conclusion, the Panel found it unnecessary to consider the second limb of the approach endorsed by Rooke J. in *Kane 3, supra* note 318.

[348] Although in one of these cases (*Kane 4, supra* note 331.) the decision was overturned on appeal (*Alberta Report v. Alberta (Human Rights and Citizenship Commission)*, *supra* note 342.).

of communication which was not covered by the traditional Ontario model. However, it is the other key dimension of the scope of a hate speech prohibition which has turned out to be less expansive than targets of hate speech might have hoped for: the harm threshold which must be satisfied before a complaint can be upheld. With a few exceptions, decision-makers in all jurisdictions have tended to establish a high hurdle that complainants must overcome in order to support a finding that the conduct in question was likely to expose members of the target group to hatred or contempt. This tendency towards the application of an elevated threshold has been manifested in various ways, but the overwhelming motivation for this approach has been the concern of adjudicators to limit the impact of hate speech prohibitions on the right to free speech.

The net result of this pattern (which, it must be said, has not been universally followed) is that, save for the fact that a broader range of methods of communication are covered by the legislation, it is doubtful whether the residents of British Columbia, Alberta and Saskatchewan enjoy a significantly higher quality of protection than their fellow Canadians in those provinces and territories which continue to rely on the traditional Ontario model prohibition on discriminatory signs and symbols.

5. CONCLUSION

This article has examined more than half a century of operation of provincial and territorial hate speech laws in Canada. This examination has confirmed that free speech sensitivity has long been an integral and enduring feature of the administration and interpretation of legislative regimes for the regulation of hate speech—a finding that should come as a shock to no-one. What is surprising is the *way* in which free speech sensitivity has impacted on the operation of hate speech laws, and the *effects* of that influence on the quality of the protection provided to victims by existing provincial and territorial laws.

As expected, the constitutional jurisprudence surrounding s.2(b) of the *Canadian Charter of Rights and Freedoms* has provided an important reference-point for the decision-making of provincial adjudicators in hate speech cases. However, constitutional protection of the right to freedom of expression has not resulted in the invalidation of provincial hate speech laws. Consistent with the principles and values

endorsed by the Supreme Court of Canada in *Keegstra*[349] and *Taylor*,[350] restrictions on hate speech in provincial human rights statutes have been regarded as a justifiable restriction on the right protected by s.2(b) of the *Charter.*

But it is important to recognise that this is not the end of the story of the influence of free speech sensitivity on provincial hate speech laws. One of the important threads which runs consistently, even if not universally, through the history of adjudication under provincial hate speech laws is a lingering unease about the legitimacy of legislative restrictions on the communication of ideas—even ideas of racism, homophobia or other forms of prejudice directed at a particular group. This unease has been manifested in the preference of a number of judicial and quasi-judicial decision-makers for a narrow construction of the scope of provincial hate speech prohibitions, particularly in those jurisdictions where the legislature has expanded the prohibition beyond the traditional, and reasonably innocuous, prohibition on discriminatory signs and symbols. Even in cases where this approach has been taken, some complainants have been able to satisfy the elevated threshold for establishing that the conduct in question was unlawful. However, in a numbers of cases, the direct effect of the raising of the legal threshold has been that the complainant, and the wider community which the complainant represented, have been denied legal redress. In terms of the more general and long-term impact, the tendency towards a narrow construction of provincial hate speech prohibitions in public adjudications sends a powerful symbolic message to the broader community about the practical breadth of the category of protected speech upon which hate speech laws should not be permitted to impinge.

This tendency towards a restrictive interpretation of hate speech prohibitions is not universal. Beneath this dominant thread is a counter-tendency, observable in a smaller number of cases, towards giving legislation a fuller or even expansive definition, without apparent concern for the consequences for freedom of expression. In fact, one of the surprising findings of this study is that in a context where the jurisprudential landscape for the right to freedom of expression has been well developed, particularly in the past 10 years, there is still a notable amount of inconsistency and divergence amongst adjudicators with respect to central questions about how similar legislative restrictions on hate speech should be interpreted in light

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[349] *Supra* note 3.

of *Charter* and free speech sensitivities. This finding demonstrates that it by no means follows that resolution of the *legal* (or constitutional) status of a set of values—in this case, 'free speech'—will put an end to wider moral and political debates about the relative importance of those values.[351] These considerations may be regarded as 'non-legal', but there can be little doubt that they exert a strong influence on the decision-making process in the context of adjudications on alleged violations of hate speech prohibitions.

Free speech sensitivity has exerted a powerful influence on the operation (interpretation and application) of hate speech laws, with negative implications for the level and quality of protection afforded to those individuals and groups in Canadian society who suffer discrimination and other forms of harm by virtue of their identity. This finding reveals that the practical relationship between the concept of 'free speech' (including legal rights, political values and rhetoric, and philosophical principles) and hate speech laws is not merely determined at the level of the Supreme Court of Canada's *Charter* jurisprudence, but is constituted and reconstituted at the more modest and less visible level of quasi-judicial and judicial decision-making under provincial human rights laws.

One of the chief objectives of hate speech prohibitions in provincial and territorial human rights statutes is to draw a line between *free* speech which must be protected (or at least tolerated), and *hate* speech which must be outlawed and sanctioned because of its harmful effects. Such line-drawing exercises are never simple and almost always controversial. However, the extent of the uncertainty and controversy has been exacerbated in Canada by the multi-layered influences of free speech sensitivity described above, as well as ongoing differences amongst decision-makers regarding the legitimate scope of hate speech prohibitions. The net result is that the contours of unlawful hate speech in Canada are anything but sharp. On the contrary, the boundary between free speech and hate speech remains contested and fluid.

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[350] *Supra* note 4.

[351] See Moon, *supra* note 13.